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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 69.

THE CHICAGO ROCK ISLAND & PACIFIC RAILWAY COMPANY, CHICAGO & NORTH WESTERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SEABOARD AIR LINE RAILWAY COMPANY, AND SOUTHERN RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTH MANCHESTER RAILROAD COMPANY,

Appellees.

BRIEF ON BEHALF OF APPELLANTS.

MAY IT PLEASE THE COURT:

1. REFERENCE TO OFFICIAL REPORT OF OPINION OF LOWER COURT AND TO REPORTS AND ORDER OF INTERSTATE COMMERCE COMMISSION.

No opinion was rendered by the District Court in this case. The court's conclusions are contained in fourteen

findings of fact and four conclusions of law which are not officially reported, but appear at pages 1169 to 1173, inclusive, of the printed record. Two reports were made by the Interstate Commerce Commission in the proceedings before it, the case being entitled "Rules for Car Hire Settlement, Docket No. 17801". The first one dated January 7, 1930, is reported at 160 I. C. C. 369, and appears at pages 17 to 96, inclusive, of the printed record. The second or supplemental report, dated July 15, 1930, is reported at 165 I. C. C. 495, and appears at pages 97 and 98 of the printed record. Attached to the supplemental report of the Commission is the order attacked herein. This order is not contained in the published reports of the Commission, but appears at pages 99 to 117, inclusive, of the printed record.

2. Proceedings Before the Commission.

The case before the Commission, known as "Rules for Car Hire Settlement, Docket No. 17801", was instituted by the Commission upon its own motion and, as appears from its first report (R. 20), relates to,—

> "the rules for car-hire settlement between common carriers by railroad in the United States for the use and detention of freight cars while on the lines of carriers other than their owners."

The order instituting the investigation (Part of Ex. 1, certified to this court) was entered on January 4, 1926, and all common carrier railroads in the United States, including appellants, were named as respondents. Prior thereto, the Commission had considered the matter of car hire in a number of cases involving individual railroads and by orders dated June 7 and June 23, 1926 (Part of Ex. 1, certified to this court) those cases were reopened and/or consolidated with the general investigation, in so far as they related to the subject of car hire. A list of

them appears in the notes at the bottom of pages 372 and 373 of the Commission's first report (R. 20, 21) and they are discussed at pages 401 to 439 of the same report (R. 49-87).

In some of the cases thus consolidated with the general investigation, orders had been entered. Still other cases were pending before the Commission on proposed reports made by Examiners, and still others were pending on complaints in connection with which no hearings had been held. The consolidated proceeding was thereafter set for hearing and hearings were had over a considerable period of time, as a result of which a very large record was made. On all of these hearings the trunk line members of the American Railway Association, including all appellants, were represented by that Association (R. 136, 207, 208, 221).

The record made before the Commission in Docket No. 17801 comprised 4821 pages of testimony and 530 exhibits, many of which were voluminous. This evidence covered a very wide range, and will be referred to later in detail, in so far as it relates to the issues on this appeal. In deciding the case, the Commission made the two reports referred to. In the first one, dated January 7, 1930 (R. 17, *et seq.*) there is a considerable discussion of the evidence. No order was entered at that time but the report concluded with nine specific findings, and it was said that while no order would be entered, the carriers would be expected to modify their rules and practices with respect to car hire to conform to the conclusions expressed in the findings (R. 92, 93).

On April 18, 1930, a petition for rehearing (Part of Ex. 1, certified to this court) was filed with the Commission on behalf of the American Railway Association, which included appellants. This petition was denied on June 9,

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 69

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

BRIEF ON BEHALF OF APPELLANTS.

ALFRED P. THOM,
W. F. DICKINSON,
R. N. VAN DOREN,
R. V. FLETCHER,
HERBERT FITZPATRICK,
GEORGE F. BROWNELL,
C. C. PAULDING,
C. B. HEISERMAN,
BEN C. DEY,
F. BARRON GRIER,
EDWARD S. JOUETT,
W. R. C. COCKE,
L. E. JEFFRIES,
FRANK H. TOWNER,
Solicitors for Appellants.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

1930, and this action was followed by the issuance of the supplemental report of the Commission, dated July 15, 1930 (R. 97, 98). The order herein attacked (R. 99 *et seq.*) was attached to the supplemental report and in that order, the Commission reduced to order form the findings contained in its first report.

The two reports are made a part of the order, which is directed to a great number of common carriers, including all appellants. It contains five numbered paragraphs and orders all respondents named therein to establish, on or before October 1, 1930, and to thereafter maintain, rules with respect to car-hire settlements in conformity with the requirements of those paragraphs; also, to cease and desist, on or before October 1, 1930, from applying any rules with respect to such settlements, which are in conflict with the requirements of those paragraphs. Appellants attack only the requirements of those paragraphs of the order numbered 2, 3 and 5, and are willing to observe and comply with all other requirements of the order. Pending the determination of this litigation in the lower court, the effective date of the order was postponed from time to time (R. 1169) but became effective on January 30, 1931, and is now in effect.

"Car Hire", as the term is generally understood, means the compensation paid by or due from a railroad having possession of a freight car not owned by it, to the railroad owning such car. "Per Diem" is a term which has the same meaning, and is used because the compensation is computed upon a daily or per diem basis. At pages 374 and 375 of the Commission's first report (R. 22, 23) there is a brief statement of the history of car hire, which reflects the facts developed upon the record. Briefly, it was not until 1902 that the railroads of

the country as a whole were able to agree upon rules governing the payment for freight cars by roads using but not owning such equipment. (R. 140, 141). Prior to that time the compensation paid as between railroads for the use of non-owned freight cars had generally been on a mileage basis, which was unsatisfactory for a number of reasons (R. 193, 194, 907). In that year, the first definite agreement known as the Per Diem Code, was promulgated by the American Railway Association, the basic principle of the Code being that per diem should be paid to a railroad owning a freight car for each day the car was off the rails of the owning railroad (R. 141).

Since 1902 there has been a substantial development of that Code. Almost every rule thereof has been changed and some rules have been changed many times, every change having been made as a result of experience which indicated its desirability or necessity (R. 194). At the time of the hearings before the Commission, the rules then in effect (R. 1068) represented the best judgment of men in direct charge of the operation of individual railroads (R. 193). Those rules were made effective through subscription by railroads to what is known as the Per Diem Agreement (R. 194), introduced in the hearings before the Commission as Exhibit 10 (Part of Ex. 1, certified to this court). This agreement is reproduced at page 376 of the Commission's first report (R. 24). In it, each subscribing railroad agrees to abide by and enforce the provisions of the Per Diem Code. The rules themselves are contained in Exhibit 505, filed in the hearings before the Commission (R. 893), and which is reproduced at page 1068 of the printed record.

The Per Diem Code has never been filed with the Commission as a tariff, and it was testified that there were substantial objections to so filing it (R. 220, 907, 908).

Since 1902, the Code has been administered by the American Railway Association, a voluntary association of railroads, formed for the purpose of harmonizing and coordinating, through recommendation, the principles and practices of American railroads with respect to their construction, maintenance and operation (R. 192, 193). The requirements for admission to the Association and subscription to the Per Diem Agreement are set out at pages 376 to 378 of the Commission's first report (R. 24-26). It should be remembered that the American Railway Association has always been a private voluntary organization of American railroads and that the Per Diem Agreement has always been a voluntary agreement between railroads. At no time has the Association been able to compel subscription to that Agreement or compliance therewith, and every common carrier has at all times been a free agent in the matter of agreeing thereto.

The obvious necessity of having some universal standard for the interchange of freight car equipment, the return thereof and payment therefor by roads using but not owning such equipment was so urgent, however, that at the time of the hearings before the Commission, 1347 of a total of 1731 steam railroads in the United States were subscribers to the Per Diem Agreement. These railroads operated 97.79% of all railroad mileage in the United States and owned 99.81% of the interchangeable freight car equipment owned by all common carriers in the country. Of a total of 169 electric railroads in the country, 62 were subscribers, these 62 operating 47.5% of the total mileage and owning 99.75% of all interchangeable freight cars owned by electric lines (Ex. 504 before Commission, R. 1066). These facts were found by the lower court (R. 1170). All the Class I railroads and most of the Class II railroads in the United States are subscribers (R. 196).

Practically all railroads in the country owning interchangeable freight equipment, including each appellant (Ex. 11 before Commission, R. 998 *et seq.*), were subscribers to the Per Diem Agreement at the time of hearings before the Commission, and the operation of the rules was such that approximately 2,600,000 railroad-owned freight cars moved freely under them on the 300,000 miles of railroad in the country (R. 193). It is true that a number of carriers were not subscribers, but such nonsubscribers were principally Class III railroads operating but little mileage and owning but few interchangeable freight cars (R. 196). Moreover, the provisions and requirements of the Code were generally observed by all carriers subscribing thereto.

As appears from Exhibits 502 (R. 1039 *et seq.*), 503 (R. 1053 *et seq.*) and 504 (R. 1066) before the Commission, of 491 nonsubscriber railroads in the country, only 239 were permitted to use freight cars belonging to subscribers without payment therefor at the regular per diem rate. Of these 239 roads, 147 steam roads were industrially owned and received some free use of non-owned freight cars under the provisions of the Code (R. 920) and the decisions of the Commission in the previously decided cases consolidated with Docket No. 17801. Thus, only 92 steam and electric roads were allowed some free use of equipment contrary to the provisions of the Code, and these roads operated only 3,672 miles and owned only 245 interchangeable freight cars. The relative unimportance of these departures from the requirements of the Code is apparent when it is realized that there are 2,900 railroads in the country, operating 325,205 miles and owning 2,633,837 interchangeable freight cars (Ex. 504, R. 1066).

Exhibit 505, introduced in the proceedings before the Commission (R. 893), contains the original and amended forms of each per diem rule, from July 1, 1902, when the Per Diem Code was first promulgated, up to July 1, 1927, together with other information. It appears at page 1068 of the printed record. There was also introduced as Exhibit 506 before the Commission (R. 893) a statement of changes made in certain rules on July 1, 1927 and subsequent thereto up to the close of the hearings, this exhibit appearing at pages 1069 to 1128 of the printed record.

As appears from Exhibit 505, the Per Diem Code consists of twenty rules, each of which is discussed at pages 378 to 400 of the Commission's first report (R. 26 to 48, inclusive). In addition, the Code of Switching Reclaim Rules (pp. 58 to 67 of Ex. 505, R. 1068) is made a part of the Per Diem Code by Per Diem Rule 5 (p. 10 of Ex. 505, R. 1068). Car Service rules 1 to 5, inclusive (p. 55 of Ex. 505; R. 1068) and which govern the physical handling of freight cars as between railroads, are made a part of the Per Diem Code by Per Diem rule 3 (p. 7 of Ex. 505; R. 1068), and Car Service Rule 6; which governs the delivery of cars as between railroads, is made a part of the Code by Per Diem Rule 9 (pp. 17 and 18 of Ex. 505, R. 1068).

Generally speaking, the Per Diem and Reclaim rules completely cover the matter of car interchange between railroads subscribing to the Per Diem Agreement, the accounting and payment by each subscriber for cars used but not owned by it, the reclaims to be allowed, the manner of handling cars and the methods of dealing with nonsubscribers. By Per Diem rule 18 (p. 47 of Ex. 505; R. 1068) it is provided that the Per Diem Code shall not apply to private cars or the cars of non-

subscribers. In deciding the case before it, the Commission did not undertake to change all of the Per Diem and Reclaim rules, nor to prescribe a complete set of rules which should govern the matter of car hire between carriers. On the contrary, the findings of the Commission in its first report (R. 92, 93) and the requirements of its order (R. 99, 100) relate to only a few of the Per Diem and Reclaim rules.

3. FINDINGS OF THE COMMISSION AND REQUIREMENTS OF ITS ORDER.

(a) Per Diem Rule 1 (p. 1, Ex. 505; R. 1068) relates to the per diem rate and since July 1, 1921, has fixed this rate at $1 per car per day. The Commission's discussion of this rule appears at page 378 of its first report (R. 26). The volume of this rate was an issue in Docket 17801 (R. 221) and that issue is dealt with in Finding 1 in the Commission's first report (R. 92), which reads as follows:

> "that common carrier railroads, whether subscribers to the per diem agreement of the American Railway Association or nonsubscribers, are entitled to receive reasonable compensation in the form of a daily rental for the use of their general service freight cars when on foreign lines, and that the present per diem charge of $1 per car day reasonably compensates car owners for average car ownership and maintenance costs. The reasonableness of this per diem rate is not questioned."

In this finding the Commission approves the current per diem rate of $1 per car per day and recognizes the right of every common carrier to receive that amount as compensation for the use of its freight cars by other common carriers. We do not criticize this finding. On the contrary we approve it, and only call attention to it at this time so that the court will have it in mind when

considering the application made by the Commission of the principles therein enunciated.

(b) Paragraph (1) of the order (R. 99) requires

> "that the same daily car rental shall be paid to common-carrier nonsubscribers as respondents contemporaneously pay to subscribers to the per diem rules agreement of the American Railway Association, for the use of general service freight cars."

Since 1920, Per Diem Rule 18 (p. 47 of Ex. 505, R. 1068) has provided as follows:

> "18. These rules shall not apply to private cars or to cars of nonsubscribers."

The rule is quoted at page 398 of the Commission's first report (R. 46), together with a resolution adopted by the Association on November 16, 1915, in which it was recommended that instead of per diem, subscribers to the Per Diem Code should pay mileage for their use of freight cars belonging to nonsubscribers. Such a payment was ordinarily less than the per diem rate of $1, and the recommendation of the resolution was generally complied with by subscribers until the Commission, in the *Lake Erie & Fort Wayne R. R. Co. Case*, 78 I. C. C. 475, which was reopened and consolidated with the general investigation (R. 20, 21) held that the industrial nonsubscriber roads there under consideration should receive the per diem rate for the use of their freight cars by other carriers (R. 901). The purpose of the resolution was to induce subscription to the Per Diem Code and prevent the payment of per diem on private cars belonging to plant facility railroads not common carriers, which payments would amount to rebates to the controlling industry (R. 901-903).

The requirements of Per Diem rule 18 and the resolution of November 16, 1915, are discussed at pages 398 to 400 of the Commission's first report (R. 46-48) and con-

demned in Findings 1 and 2 (R. 92) as being unreasonable. Paragraph (1) of the order is apparently designed to carry those findings into effect. From the Commission's discussion of Per Diem rule 18, it might be concluded that subscribers to the Per Diem Agreement assert their unqualified right to receive per diem but seek to limit the right of nonsubscribers to receive it. This is not correct. Subscriber roads have only insisted that their payment of per diem to a nonsubscriber should be conditioned upon the payment of per diem by nonsubscribers when conditions are reversed.

Appellants do not attack this requirement of the order, but when considered in connection with Paragraph (5) it creates the very condition which subscribers to the Per Diem Agreement have always sought to avoid. It apparently recognizes the right of nonsubscribers, as a class, to receive the per diem rate for the use of their cars by other roads, but does not extend the same right to subscribers. On the contrary, other paragraphs of the order expressly deny to those subscribers the right to receive that compensation for the use of their cars which, under Paragraph (1) is required to be paid to nonsubscribers.

Any doubt which exists of the right of nonsubscriber roads to receive per diem under all circumstances, arises from the uncertainty created by the language used in Paragraph (5). Under that paragraph, all railroads less than 100 miles in length and which deliver to each *subscriber* connection all freight cars received from that connection, are given some free use of freight cars not owned by them. Nothing is said, however, about their obligation to return freight cars to the *nonsubscriber* connection from which they were received. Their failure to return all freight cars to the *nonsubscriber* con-

nection from which they were received, would certainly not deprive such railroads of their right to the free use of cars at the expense of their *subscriber* connections, and it seems to be equally certain that the failure of such railroads to return all cars to the *subscriber* from which they were received would deprive them of all right to the free use of cars. Their right to the free use of cars at the expense of *nonsubscribers,* dependent upon their return of all cars to the *subscriber* from which they were received, is uncertain. If such free use of cars is not intended to be permitted under Paragraph (5), then Paragraph (1) assures nonsubscribers of their right to per diem under all circumstances, while Paragraph (5) denies the same assurance to subscribers.

In any event, Paragraphs (1) and (5) do create a class of railroads which will definitely receive the free use of nonowned freight cars and at the same time be assured of receiving the full per diem rate for the use of their cars by other railroads. The Little River Railroad, Oneida & Western Railroad, Pearl River Valley Railroad, Sumter & Choctaw Railroad and Interstate Railroad (p. 1 of Ex. 40; R. 1168a) are representative of this class.

Each appellant is more than 100 miles in length and is a subscriber to the Per Diem Agreement (Ex. 11, R. 998 *et seq.*). Each is therefore required, under this paragraph and Paragraph (4) of the order, to pay the per diem rate for its use of cars belonging to nonsubscribers. By Paragraph (5) of the order, however, each appellant is required to permit the free use of its cars by a class of railroads principally composed of nonsubscribers.

(c) Paragraph (2) of the order (R. 99) requires "that similar reclaim allowances shall be made to

nonsubscribers as to subscribers of the per diem rules agreement, in connection with cars handled in terminal switching service, as the latter term is defined by the switching reclaim rules of the American Railway Association."

Appellants attack this requirement of the order. The Switching Reclaim rules referred to in this paragraph are contained at pages 58 to 60 of Exhibit 505 (R. 1068) and are also attached to the Commission's first report as an appendix (R. 94-96). As stated, they are made a part of the Per Diem rules by Per Diem rule 5 (p. 10 of Ex. 505; R. 1068).

Per Diem rule 5 and the Switching Reclaim rules are discussed at pages 379 to 386 (R. 27-34) and pages 439 to 444 (R. 87-92) of the Commission's first report. As there pointed out (R. 29), since 1913, Per Diem rule 5 (p. 8 of Ex. 505; R. 1068) has provided that no switching reclaim will be allowed a nonsubscriber, and Per Diem rule 6b (p. 12 of Ex. 505; R. 1068) has contained the same restriction since 1922. Apparently as a result of its previous discussion of switching reclaim, the Commission, in Findings numbered 3 and 4 in its first report (R. 92) condemned the limitations of Per Diem rules 5 and 6b as being unreasonable and said that the same terminal switching reclaim allowances should be made to nonsubscribers as to subscribers. Paragraph (2) of the order carries this conclusion into effect.

While some statements in the Commission's discussion of switching reclaim would indicate that it was objectionable, it is not condemned. On the contrary, it is approved and required to be extended to other railroads which have not heretofore participated in it. Nor is the failure of subscriber roads to extend switching reclaim to nonsubscriber roads found to be an unlawful discrimination. It is only found to be unreasonable.

Switching reclaim is founded upon the practical necessity of relieving a terminal switching road from the payment of per diem. When the Per Diem rules were formulated, it was required that every road pay the per diem rate for its use of freight cars belonging to other carriers (R. 141). It was known, however, that switching roads generally did not receive rates high enough to enable them to pay per diem (R. 158); that many of them would go "broke" if required to pay it, and it was thought impracticable to increase their rates sufficiently to enable them to pay it (R. 142, 158).

Switching charges are theoretically based on cost of operation not including car hire (R. 198), and increasing those charges to include car hire was not only impracticable when the Code was formulated but was still so at the time of the hearings before the Commission (R. 909, 929). Even under the various mileage systems of car hire, no car hire was paid on cars handled in switching service (R. 27, 197, 198). In the Commission's first report, it is said that railway executives sustained the traffic officials in their refusal to increase switching charges by amounts sufficient to absorb car hire (R. 27), but this is inaccurate. The reason given on the record for not so increasing switching charges was that it could not practically be done.

Confronted with this situation, the railroads first proposed to grant switching lines the free use of freight cars not owned by them, but this idea was abandoned because of various complications and objections (R. 198), and the terminal switching reclaim plan substituted. Other suggestions have also been considered, but all committees of the American Railway Association unanimously concluded that switching reclaim was the best method of handling the situation (R. 916). Under such

reclaim, every subscriber railroad pays per diem to all other subscribers whose cars it handles in terminal switching service, as that term is defined in the Reclaim rules. It is then permitted to collect from the line-haul railroad to or from which each car is handled, for each car so handled, an amount representing the average per diem expense per car, incurred by it in handling all cars in such switching service.

Thus, terminal switching reclaim as between subscribers to the Per Diem Code, has always been a voluntary refund to a switching line, of per diem paid by it on cars handled by it in terminal switching service, the refund being made by the line-haul carrier to or from which the car is handled. This refund does not profit the railroad receiving the reclaim, but only makes it whole on per diem paid by it on cars handled in terminal switching service (R. 200). The Commission itself has denominated the plan as a refunding operation (R. 27). It is necessary, however, that the switching service be terminal switching, as this term is defined in the Reclaim rules, and that the service be performed within designated switching limits on a switching charge. Under no other circumstances will terminal switching reclaim be allowed to any road under the rules.

To use an example, the Pennsylvania Railroad might handle a shipment from New York to Chicago in a freight car owned by the Chicago, Rock Island and Pacific Railway, the shipment being consigned to a consignee located on the tracks of the Chicago and North Western Railway in the Chicago switching district. Upon bringing the shipment to Chicago, the Pennsylvania would turn it over to the North Western for delivery to the consignee. In making that delivery, the North Western would handle the car in terminal switching service in the Chicago switching district on a switching charge.

Under the Per Diem rules, the North Western would be obliged to pay to the Chicago, Rock Island & Pacific, the owner of the car, per diem at the rate of $1 per day for the number of days it (the North Western) had the car in such terminal switching service; but in turn would collect from the Pennsylvania, from which it received the car, an amount representing its average per diem expense per car on all cars handled by it in terminal switching service. The effect of the whole operation is to impose upon the Pennsylvania the obligation of assuming the per diem which would accrue upon the car while it is in the possession of the North Western and in terminal switching service, and to relieve the North Western, the terminal switching carrier, of such payment.

As between subscribers to the Per Diem Code, this voluntary refund has been made because of benefits moving to the railroad making the refund. In return for a subscriber's agreement to pay the per diem accruing on freight cars handled by other subscribers in terminal switching service and otherwise comply with the requirements of the Code, every other subscriber agrees to assume the same obligations. Particularly does every other subscriber agree to pay switching reclaims when conditions are reversed, so that every subscriber road receives payment in kind for switching reclaims paid by it (R. 903). For these reasons, reclaim was not allowed to nonsubscribers, which, because of their refusal to subscribe to the Per Diem Agreement, could not be required to sustain the obligations of the Per Diem Code in return for the benefits thereof. Under Paragraph (2) of the order, however, terminal switching reclaim becomes a compelled assumption by subscriber roads of what is, after all, nothing but an operating expense of nonsubscriber roads.

Since the class of railroads created by this paragraph is limited to nonsubscriber roads, it is not the same as the class definitely created by Paragraph (1) of the order and which is entitled to receive per diem under all circumstances, but is not required to pay it. A subscriber road which under the order might be entitled to receive reclaim without allowing it, is still required to allow it under the per diem rules.

For this compelled assumption of the car-hire liability of nonsubscriber roads, subscriber roads will receive nothing. The switching service in connection with which they are required to assume the liability is not performed for them or on their behalf and they get nothing for it, either from the switching line, the shipper or the consignee. They do not have the agreement of nonsubscribers to assume those obligations imposed by subscription to the Per Diem Code and in the absence of such subscription cannot require nonsubscribers to comply with the provisions of that Code.

Nor does the order require such nonsubscriber roads to assume those obligations. There is no requirement that per diem be initially paid by the nonsubscriber, although the necessity for such a payment might be inferred as a prerequisite to the allowance of the switching reclaim. And as we have said, there is no requirement that such nonsubscribers shall allow reclaim to subscribers when conditions are reversed. The result is that subscribers will not receive reclaim from such nonsubscribers unless it is voluntarily paid.

As appears from Exhibit 504 before the Commission (R. 1066), there are 491 railroads which do not subscribe to the Per Diem Agreement and which, under the Per Diem Code, are not entitled to receive terminal switching reclaim from subscribers. Each of these roads, however, has at all times been able to acquire the right

to such reclaim by subscribing to the Per Diem Code and assuming the obligation to pay such reclaim. Under Paragraph (2) of the order, they are given the right to such reclaim without being required to assume any obligation in payment therefor. The disadvantage under which they have heretofore labored, and which they could have eliminated by their own action, has been transferred to subscriber railroads, which are not given the option previously extended to nonsubscribers.

At page 383 of its first report (R. 31) the Commission said:

> "After a road haul movement is performed by a short line carrier and the switching movement by a trunk line, the latter may enforce its right to reclaim."

This is incorrect, for in the instance cited, the trunk line may only enforce its right to reclaim if the so-called short line is a subscriber road. This is so for the reason, as we have pointed out, that up to the time of the Commission's order, switching reclaim had always been a matter of agreement between railroads and was allowed only because of subscription to the Per Diem Agreement and the Per Diem Code, the provisions of which are not binding upon a nonsubscriber thereto and could not be.

Each appellant is a subscriber to the Per Diem Agreement (Ex. 11, R. 998 *et seq.*). On the trial of this case in the District Court, there were introduced in evidence (R. 995) Exhibits 29 to 40, inclusive, which showed, with respect to traffic handled by each appellant in 1929, representative and typical illustrations of the effect of the Commission's order (R. 998). The exhibits were not intended to show the total loss which would be imposed upon each appellant by an application of the order, but were compiled as being illustrative and representative

(R. 998). They are identical in form (R. 997) and Exhibit 40, relating to appellant Southern Railway is reproduced in the printed record (R. 1168a, 1168b) as representative of all such exhibits. The results of the application of Paragraph (2) of the Commission's order are illustrated on page 2 of Exhibit 40 (R. 1168b).

As appears from the lower half of page 2 of that exhibit, the Buffalo-Union Carolina Railroad is not a subscriber to the Per Diem Agreement and owns no freight cars. A witness testified for this road on the hearings before the Commission, his evidence appearing at pages 647 to 651, of the printed record. It connects with the Seaboard Air Line Railway and the Southern Railway, both of which are subscriber roads (R. 1020, 1021). In 1929, the Southern handled 436 cars in terminal switching service to or from this railroad, which also handled 316 cars in terminal switching service to or from the Southern. Up to the time of the Commission's order, the Southern neither received a reclaim from nor paid a reclaim to this railroad, since it was a nonsubscriber (R. 650).

Under Paragraph (2) of the Commission's order, however, the Buffalo-Union Carolina Railroad would have received from the Southern an average switching reclaim of $4 per car on the 316 cars handled by it in terminal switching service to or from the Southern in 1929, or a total amount of $1,264. This payment by the Southern would have permitted the Buffalo-Union Carolina to use the 316 freight cars which it did not own, in the transaction of its own business, for an average period of four days per car at no cost to it. The compensation due the owners of those cars would thus be paid by the Southern; and for this enforced payment of an operating expense of the Buffalo-Union Carolina, the Southern would have received nothing.

It would not receive the benefits which it received from other subscriber railroads because of their subscription to the Per Diem Agreement and could not even compel a similar payment to it on the 436 cars which it handled in terminal switching service to or from the Buffalo-Union Carolina in the same year. And if the Buffalo-Union Carolina had used cars owned by the Southern in terminal switching service, the effect of Paragraph (2) of the order would have been to require their use without the giving of any compensation of any kind to the Southern.

This example is typical. Every such nonsubscriber performing a terminal switching service on cars moving to or from each appellant, as shown on Exhibits 29 to 40, inclusive, will be permitted the same free use of freight cars not owned by it, and in every such case, the cost of furnishing the car for use by such nonsubscribers will be borne by the connecting appellant. Only the amount will vary, dependent upon the number of cars handled in terminal switching service by such nonsubscribers and the length of time they are used.

(d) Paragraph (3) of the order (R. 100) requires,—

> "that short-line railroads which are less than 100 miles in length, and which return railroad-owned equipment to the road from which received, shall not be required to report per diem accruals to numerous car owners throughout the country, but shall be attached to their connecting carriers for purpose of car-hire settlement."

Appellants attack this requirement of the order. Per Diem rule 9 (p. 17 of Ex. 505, R. 1068) requires the exchange between connecting carriers of interchange reports for each calendar day on a prescribed form, in a certain manner; the reports containing a list of cars delivered to or received from connections each day. The rule is discussed at pages 395 and 396 of the Commis-

sion's first report (R. 43, 44). Per Diem rule 10 (p. 18 of Ex. 505, R. 1068) provides that junction reports for each day shall be made to car owners on prescribed forms, these reports advising the car owner that its car has passed from the reporting road to another road. Per Diem rule 11 (p. 24 of Ex. 505, R. 1068) provides that within 40 days after the end of each calendar month, car owners shall be furnished with a per diem report for that month showing the number of days each of its cars has been in the possession of the road making the report. Per Diem rules 10 and 11 are discussed by the Commission at pages 396 and 397 of its first report (R. 44, 45).

The effect of Per Diem rules 9, 10 and 11 is to require every subscriber railroad to report per diem accruals direct to the owners of cars used by it and to pay per diem on such cars direct to such owners. These requirements are condemned as uneconomical and unreasonable in Finding 5, at page 444 of the Commission's first report (R. 92) in so far as they apply to carriers less than 100 miles in length and which return railroad owned equipment to the road from which received. The finding further provides that such roads shall be attached to their connecting carriers for purpose of car-hire settlement, and Paragraph (3) of the order reduces this finding to order form. In designating these roads, the distinction between subscriber and nonsubscriber roads is abandoned, thus creating a class of railroads still different from that created by Paragraphs (1) and (2) of the order.

The provisions of the Per Diem Code do not apply to nonsubscriber railroads and consequently such roads do not now make the reports or payments required by Per Diem rules 9, 10 and 11. Reports and payments for freight cars used by them are made under those rules by

the subscriber railroads which deliver the cars to them. Such delivering carriers are then obligated by Per Diem rule 6 to collect the regular per diem rate, without free time or reclaim, from the nonsubscribers for their use of the cars. Thus, Paragraph (3) of the order does not require any change to be made in the present methods of car accounting as between subscriber and nonsubscriber railroads. It does, however, operate to relieve all subscriber railroads less than 100 miles long and which return railroad-owned equipment to the road from which it was received, from the obligation and expense of reporting their use of freight cars not owned by them. This obligation and expense is imposed upon their connecting lines. And this concession is required to be made only to railroads which have contracted through their subscription to the Per Diem Agreement, to perform at their own expense the duty of accounting for non-owned freight cars used by them.

The obligation of accounting for their use of non-owned freight cars is one assumed by all subscribers to the Per Diem Agreement in return for the benefits moving to them under that Agreement, which include the right to receive an accounting for their freight cars when used by other railroads (R. 903, 904). Under this paragraph of the Commission's order, however, those railroads which are required to assume the car accounting expense of their connections will receive nothing, in money, service or otherwise, for the expenditure which they are required to make. In effect, they are required to pay an operating expense incurred in the independent operation of a connecting carrier, with no benefit or compensation therefor.

Each appellant is more than 100 miles in length (See Ex. 11 before I. C. C.; R. 998-1025; R. 1169) and connects with many carriers less than 100 miles in length

(Ex. 29 to 39, inc., part of Ex. 1 certified to this court, Ex. 40, R. 1168a, 1168b). Each is therefore debarred from receiving the benefit of Paragraph (3) of the order, and to some extent is required to assume the obligation and expense of accounting for freight cars used but not owned by its connections. For example, the Hartwell Railroad, shown on page 1 of Exhibit 40 (R. 1168a) is only 10 miles long, owns no freight cars, connects with only one railroad, the appellant Southern Railway, and of necessity delivers back to the Southern all freight cars received by it from the Southern.

It is qualified, therefore, as a railroad which should be attached to the Southern for purposes of car-hire settlement and, although as a subscriber it was required to report to the owners of freight cars used by it, it is not now required to do this. On the contrary, Paragraph (3) of the order requires the Southern to make reports not only for non-owned freight cars used by it but also for all freight cars used but not owned by the Hartwell. And for this enforced assumption of the obligations of the Hartwell and the resulting expense, the Southern will receive nothing. The same situation exists with respect to every appellant, as shown by Exhibits 29 to 40, inclusive.

It is conceded that the imposition of this burden upon appellants will cost them money (R. 160, 167, 168) but the amount thereof cannot be definitely stated. It would necessarily depend upon the number of cars involved and other circumstances. And it cannot be denied that for this expenditure, appellants will receive nothing.

Nor will the operation of this paragraph of the order be uniform. Railroads such as the Hartwell, which are less than 100 miles long and which have only one connection will, of course, never have to pay the expense of ac-

counting to the owners of freight cars used by them, since they will necessarily return all railroad-owned freight cars used by them to the road from which received. Other railroads, however, may at some periods be enabled to impose their car accounting expense upon their connections and at other periods be required to sustain that expense themselves.

Thus, as appears on page 1 of Exhibit 40 (R. 1168a), the Washington & Old Dominion Railroad, a subscriber 72 miles in length, connects with five railroads, including the Chesapeake & Ohio, Southern and Pennsylvania, appellants here. If it is able to return to each of those railroads during any accounting period, all railroad-owned freight cars which it receives from each of them, it can require them to assume the expense of reporting to the owners of such cars for its use of such cars. If in other periods, however, it is unable to so return to each connection all railroad-owned freight cars received from it, the Washington & Old Dominion must assume its own car accounting expense. The status of railroads less than 100 miles in length and having more than one connection will thus be subject to constant change, dependent upon their ability to return to each connection all railroad-owned freight cars received from it.

Nor is the class of railroads which are required to do the car accounting for their connections any more certain. If a railroad not required to do its car accounting connects with another carrier which has the same right, the order makes no provision as to what should be done. Theoretically, the first carrier could cast its car accounting expense upon the second carrier and the second carrier could cast its car accounting expense upon its connection but without leaving itself any better off. The only railroads which are definitely required to

assume the car accounting expense of some of their connections, with no chance of recouping their losses, are those more than 100 miles in length, such as appellants.

(e) Paragraph (4) of the order (R. 100) provides:

> "That common-carrier railroads which interchange freight cars with more than one subscriber railroad, and which deliver to one or more subscribing carriers, freight cars which are received from another such carrier, and railroads 100 miles or more in length, regardless of the number of railroads with which they connect, shall make car-hire settlements direct with car owners in accordance with the per diem rules."

We do not attack this part of the order. It requires car hire reports and car hire payments in accordance with the Per Diem rules by all railroads, excepting only those which are less than 100 miles in length and which deliver back to each subscriber carrier all freight cars which were received from it, and carries Finding 6 in the Commission's first report into effect (R. 92).

Thus, all railroads other than those excepted, are required to pay per diem at the rate of $1 per car per day for each day's use by them of freight cars not owned by them, and are themselves required to assume the obligation and expense of accounting and paying for all freight cars used but not owned by them. In return for their assumption of these obligations they are given the right to collect the per diem rate, and receive proper reports and accounts when their freight cars are used by other railroads of the same class.

On the other hand, carriers less than 100 miles in length and which deliver to each subscriber carrier all freight cars received from it, are relieved from the obligations to which we have referred and which are imposed by the Per Diem Code, but are granted all benefits of that Code by other provisions of the order. They are given the right

to per diem under Paragraph (1); the right to reclaim under Paragraph (2); are relieved of the obligation of doing their own car accounting by Paragraph (3) and, as we shall point out, are given the right by Paragraph (5) to use cars of other carriers either without any payment therefor or upon the payment of a compensation which is insufficient under the Commission's own findings.

The distinction between railroads, created by Paragraph (4) of the order rests upon two grounds. All railroads 100 miles or more in length are required to report and pay for non-owned freight cars in accordance with the requirements of the Per Diem Code, merely because of their length. They can only receive the benefits of Paragraphs (3) and (5) of the order by ceasing to operate some part of their total mileage. Railroads less than 100 miles in length may receive the benefits of those paragraphs of the order if they are able to return all freight cars to the subscriber carrier from which they were received. If they are so unfortunate as to be unable to so return freight cars, their lack of mileage does not help them. Thus, their right to claim the benefits of Paragraphs (3) and (5) of the order will depend entirely upon their method of handling freight cars, and their status is thus subject to continual change.

The railroads in this excepted class are not necessarily those which are relieved by Paragraph (3) from doing their own car accounting, as the requirements with respect to the return of freight cars to connecting carriers are not the same in Paragraphs (3) and (4). Nor are they necessarily the same railroads that are given the right by Paragraph (2) to receive reclaim without paying it, since the roads favored under all circumstances by Paragraph (2) must be nonsubscribers. Nor are they necessarily the same railroads favored by Paragraph

(1), since the benefits of that paragraph are also confined to nonsubscribers.

(f) Paragraph (5) of the order provides:

> "That common-carrier railroads outside switching districts, other than those referred to in paragraph 4 hereof, shall pay per diem to connecting carriers on railroad-owned freight cars after deducting an average of two days free time per loaded freight car interchanged, settlements to be made at the end of each calendar month, except that no car hire need be paid on cars received for return loading with coal from coal mines which are customarily dependent upon connecting carriers for car supply."

Appellants attack this paragraph of the order. As between subscribers to the Per Diem Code, no free use of non-owned freight cars has been permitted by the Code, as Per Diem rule 1 (p. 5 of Ex. 505; R. 1068) requires that the per diem rate and penalties there prescribed must be paid for every calendar day. Switching reclaim actually does allow the free use of non-owned freight cars, as we have pointed out, but requires the initial payment of per diem by the terminal switching railroad, and is, moreover, reciprocal as between subscriber railroads.

As between subscribers and nonsubscribers, no free use of non-owned freight cars has been permitted to nonsubscribers under Per Diem rule 6b (p. 12 of Ex. 505, R. 1068). This rule is quoted at page 386 of the Commission's first report (R. 34) and the Commission's discussion of it is contained at pages 386 to 395 of its first report (R. 34-43). Presumably as a result of that discussion, the prohibitions of the Per Diem Code against the granting of free time were condemned in Findings 4 and 7, at pages 444 and 445 of the Commission's first report (R. 92, 93) as being unreasonable and Paragraph (5) of the order carries these findings into effect.

Some of the statements contained in the Commission's

discussion of this matter are not in accordance with the record and many are incomplete and misleading. At page 387 of its first report (R. 35), it is said that the so-called short lines receive a short haul in originating traffic; that their expenses include per diem, repair costs, cost of maintaining stations and agents, billing shipments, and cost of rearranging lading; that their trunk line connections receive shipments from them loaded and ready to move and ordinarily receive longer hauls. It is not said, however, that the trunk lines sustain the same costs, although that is the fact. Trunk lines also deliver traffic to the so-called short lines loaded and ready to move, and while they may receive longer hauls on some traffic, on much of it they do not.

On the same page of the first report (R. 35) it is said that the Railroad Administration allowed two days' free time during Federal control to many so-called short line railroads. The fact is that this allowance was made in return for a waiver of claims by the "short lines" against the Railroad Administration, so that the Director-General of Railroads received value for the concessions made by him. Forms of the contracts between the "short lines" and the Director-General were introduced in the hearings before the Commission as Exhibits 26, 27 and 28 (R. 228). These contracts are included in Exhibit 1, certified to this court.

At page 391 of its first report (R. 39), the Commission lists fifteen trunk line railroads and the number of their nonsubscriber connecting railroads, which, it is said, settle their car hire on same basis other than straight per diem. The statement is misleading. Of the seventeen nonsubscribers of the Missouri Pacific Railway which did not pay per diem of $1 per day per car, twelve are industrially owned (R. 864, 865) and the settlements with them are not in violation of Per Diem rule 6b. This

is also true of the five nonsubscriber connections of the Chesapeake & Ohio Railway which do not pay straight per diem (R. 958) and of two of the nonsubscriber connections of the Southern Railway which do not pay straight per diem (R. 959). Of the nonsubscriber connections of the Baltimore & Ohio Railroad which do not pay straight per diem, six, at least, settle car hire under orders of the Commission (R. 948, 949). On the Pennsylvania Railroad there is only one departure from rule 6b as between that road and its nonsubscriber connections (R. 931, 932). As we have pointed out, there have been some departures from the Per Diem Code as between subscribers and nonsubscribers, but they are few in number and relatively unimportant.

On page 391 of the Commission's first report (R. 39) it is also said that the reasons for the establishment of Per Diem rule 6b were not clearly explained. On the contrary, they were clearly explained. The record shows that the rule was established, not only to stimulate subscription to the Per Diem Agreement, but to prevent the giving of concessions through waiver of per diem (R. 195).

In discussing Per Diem rule 6b, the Commission also stated that so-called short lines were not consulted when the rule was passed, and that the American Railway Association took no steps to counteract the losses sustained by them. It is true that such roads were not consulted, since they were not subscribers to the Per Diem Agreement nor members of the Association, and properly had no voice in the matter. Also they sustained no losses through the enactment of the rule. It only required them to pay an expense incurred in the operation of their own roads, which certainly is not a loss caused by the rule.

On page 394 of the Commission's first report (R. 42) it is said:

> "The record demonstrates that there is no substantial difference in the physical service performed by terminal switching roads on the one hand and short terminal railroads outside switching districts on the other hand."

This conclusion was repeatedly stated on the hearings before the Commission as a fact (R. 150, 151, 210, 218) but there is no proof whatever in the record that it is true. It is adopted by the Commission as correct without any proof of that correctness. On the same page of the report (R. 42) it is said that participation or non-participation in through rates is the governing factor in determining the right of a railroad to reclaim, and not the character of service. This is incorrect. The Reclaim Rules (pp. 58 *et seq.* of Ex. 505; R. 1068) require that in order to get switching reclaim, a road must not only receive a switching charge, but that its service must be a switching service performed within a designated switching district.

The free use of freight cars granted by Paragraph (5) of the order falls into two categories. The first part of the order gives an average of two days' free time per loaded car interchanged to all railroads outside switching districts, other than those referred to in Paragraph (4) of the order. Paragraph (4) prescribes car-hire settlements direct with car owners, in accordance with the Per Diem rules, for all railroads more than 100 miles in length and which do not return freight cars to the subscriber road from which they were received. Thus, under the first part of Paragraph (5) every railroad less than 100 miles in length, which is outside a switching district and which does return cars to the subscriber from which they were received, is given an average allowance of two days' free use of non-owned freight cars

for every loaded car which it interchanges. This allowance is obviously intended to be granted in connection with the use of cars in line-haul movement under local or joint rates, as distinguished from a switching movement, since the language used excludes railroads inside switching districts. They are presumably taken care of by Paragraph (2). As appears from Exhibits 29 to 40, inclusive, each appellant connects with many railroads which will secure this free use of freight cars.

The exact effect of this part of Paragraph (5) may best be shown by reference to an example on Exhibit 40. On page 1 of that exhibit (R. 1168a) the Hartwell Railroad appears as a non-coal originating subscriber railroad operating outside of a switching district, being ten miles in length and owning no freight cars. Its only connection is the Southern Railway, an appellant here, and it necessarily returns all cars which it uses to the Southern. In 1929, the Hartwell interchanged with the Southern 1751 loaded per diem cars owned by railroads other than the Hartwell, after having used them for a total of 1624 days. As a subscriber, it was required to and did, under the Per Diem Code, pay $1,624 in per diem on those cars direct to the owners thereof. Under Paragraph (5) of the order it would have received an allowance of 3,502 days during which it would be permitted to use the 1751 cars without charge. This allowance was larger than the payment due, and, therefore, Paragraph (5) of the order would have permitted the use of those cars by the Hartwell without charge or expense to it.

Under Paragraph (2) of the order the Hartwell is attached to the Southern for purposes of car-hire settlement, and under Paragraphs (1) and (4) the Southern is obliged to pay per diem to nonsubscribers and in addition, make its own car-hire settlements in accordance

with the Per Diem Code. The per diem of $1,624 which accrued on the cars while they were in use on the Hartwell is therefore required to be assumed by the Southern. If any of the 1,751 cars used by the Hartwell had been Southern cars, the Southern would have been required to furnish its own equipment to the Hartwell without receiving any compensation for that use. If the 1,751 cars used by the Hartwell included cars owned by carriers other than the Southern, then the Southern would have been required to pay per diem thereon to the owner for the use of those cars by the Hartwell, and could not recapture this amount from any source. Thus, the Southern would have been deprived either of its own cars or of the money required to pay for cars owned by other roads and used by the Hartwell.

The case of the Alabama & North Western Railroad (p. 1, Ex. 40, R. 1168a) is an example of how this part of Paragraph (5) of the order substantially reduces the per diem expense of some roads without completely eliminating it. The Alabama & North Western is a non-coal originating nonsubscriber railroad, operating outside of a switching district, 21 miles in length and owning no equipment. It connects only with the Southern, and necessarily returns all freight cars to it. In 1929, it interchanged 2,642 loaded per diem cars with the Southern, after having used them for a total of 7,624 days. For this use it paid the Southern $7,624 at the rate of $1 per car per day, and the Southern became obligated to and did pay the same rate to the owners of the cars during the period of their use by the Alabama & North Western. Paragraph (5) of the order, however, would have permitted a deduction of 5,284 days from the 7,624 days, leaving a balance of 2,340 days for which the Alabama & North Western would have been required to pay the Southern at the rate of $1 per car per day, or $2,340.

Thus, the obligation of that road would have been reduced from $7,624 to $2,340, a difference of $5,284. The Southern, however, would still have been obliged to assume the payment of $7,624 for the use of the cars by the Alabama & North Western, either by permitting the use of its own cars without the payment of compensation or by paying the amount to the railroads whose cars were used. In either case, the saving of $5,284 to the Alabama & North Western becomes an obligation of the Southern under the order.

The same situation will obtain with respect to every other appellant and every other railroad similarly situated. Only the amount of their losses will be uncertain, this uncertainty resulting from the fact that a railroad which interchanges freight cars with more than one subscriber railroad, must, in order to get the free use of non-owned freight cars, return to each such subscriber railroad all freight cars received from it.

With respect to roads not situated as the Hartwell and Alabama & North Western are, the first part of Paragraph (5) is indefinite and uncertain. It is required that the railroad receiving the free use of freight cars shall be outside a switching district, but there is nothing to indicate whether or not it has to be entirely outside. Thus, a railroad which is otherwise qualified to use non-owned freight cars without payment, may have part of its line in a switching district and receive reclaim under Paragraph (2) and perform a line-haul service on the rest of its line. The York Utilities Company is such a carrier, being 37 miles in length and performing both line-haul and terminal switching service (R. 182-184). Whether or not Paragraph (5) entitles it and other railroads similarly situated to the free use of freight cars in its line-haul business does not appear. In addition, there is the uncertainty to which we have already

referred, arising from the fact that a road receiving the free use of cars is required to return all freight cars to to the subscriber connection from which they were received. Whether or not a railroad would be entitled to the free use of cars at the expense of its connecting nonsubscriber roads, if it failed to return to such nonsubscribers all freight cars received from them, is not determined by the order.

Under the second part of Paragraph (5), it is provided that no car hire need be paid on cars received for return loading with coal from coal mines which are customarily dependent upon connecting carriers for car supply. Presumably, this release from all obligation to pay car hire is intended to benefit railroads less than 100 miles in length, which are outside switching districts and which return all freight cars to the subscriber railroad from which they were received, but this meaning does not clearly appear. The doubt as to the meaning of the language used arises because that provision of the paragraph relating to the free use of cars for return loading with coal is an exception to what precedes it. Whether or not a coal originating road is entitled to the free use of cars furnished it for return coal loading, if it fails to return such cars to the subscriber connection from which they were received, it is not definitely stated in the order. We assume, however, that roads given the free use of cars for coal loading are required to return such cars to the connecting road from which they were received, since the use of the words "return loading" imply such a return of the car. This, however, is the most limited meaning that can be attached to the language used, and viewed from that standpoint, this part of Paragraph (5) constitutes a complete discharge of any obligation on the part of the carriers specified to make any payment whatsoever for their use of freight

cars not owned by them, if received as stated. This free use of cars is also granted in connection with their use in line-haul movement.

It will be observed that the language used does not make the release from the obligation to pay per diem dependent upon return of a car loaded with coal. The car is only required to be delivered to the favored carrier for the purpose of return coal loading at a mine customarily dependent upon a connecting carrier of the favored road for its car supply. If for any reason a car is not so loaded and returned, it may presumably be used by the favored road in its own business for as great a length of time as it desires to use it, and may then be returned empty to the connecting carrier without the payment of any compensation whatsoever.

Here again, the operation of this part of Paragraph (5) may best be shown by an illustration from Exhibit 40. On page 1 of that exhibit (R. 1168a), the Tennessee Railroad is shown as a nonsubscriber coal originating road, 45 miles in length, owning no freight cars and connecting only with the Southern Railway, an appellant here. A witness testified for this road, his testimony appearing at pages 643 to 647 of the printed record. The mines served by it are necessarily dependent upon the Southern, its connecting carrier, for their car supply, and all cars furnished it must be returned to the Southern. In 1929 it used 10,456 per diem cars supplied to it by the Southern for coal loading, for a total of 17,919 days and for such use paid the Southern $17,919 at the rate of $1 per car per day. Under this part of Paragraph (5) of the order it would have paid nothing. The Southern, on the other hand, would have been required to assume the entire amount of $17,919, either by permitting the use of its own cars without receiving any compensation therefor, or by paying to the owners of

those cars, under Paragraphs (1), (3) and (4) of the order, the per diem which accrued on them while they were in use on the Tennessee.

The foregoing illustration is representative of the situation existing under this part of Paragraph (5) with respect to each appellant, as shown on Exhibits 29 to 40, inclusive. Only the amount of which each appellant will be deprived in the case of roads such as the Tennessee, will be uncertain, since it will vary with the number of cars used by such coal originating connections, the length of time they are used and the purpose for which they are delivered to the coal originating road.

If we assume an obligation on the part of coal originating roads to return coal cars to the connecting subscriber road from which they were received, then the class of railroads created by this part of Paragraph (5) will vary as to membership in the same manner as the membership of the class created by the first part of the paragraph.

The losses that will be sustained under Paragraph (5) by appellants and other railroads similarly situated cannot be definitely shown, but they are certain to be substantial. Again referring to Exhibit 40 as an example, the upper half of page 1 (R. 1168a) names twelve railroads less than 100 miles in length and connecting only with appellant, Southern Railway. Since they must return all freight cars to the Southern, they are surely qualified to receive an average of two days' free use of such cars for each loaded car interchanged. In connection with cars used only by these roads in 1929, Paragraph (5) would have required the Southern to assume a loss of $55,487 which would have resulted either from the use of its cars without compensation, or from its enforced payment of per diem for the use by those twelve

railroads of freight cars owned by other railroads. And if the other ten railroads shown in this part of Exhibit 40 were able to return to the Southern all freight cars received from it, the loss of the Southern would have been increased to $82,863. To this amount should be added $39,432, representing the loss which would have been imposed on the Southern under the second part of Paragraph (5) in connection with the use of coal equipment by the four coal originating roads shown on the lower half of page 1 of Exhibit 40 (R. 1168a).

In connection with the requirements of Paragraph (5) of the order, we again call attention to Finding numbered 1 in the first report of the Commission (R. 92). As we have pointed out, this finding recognizes the right of all railroads, including appellants, to receive compensation of $1 per car per day for the use of their freight cars by other railroads. Paragraph (5) of the order, however, in contradiction of Finding 1, deprives appellants and other railroads similarly situated of the right to receive this compensation for the use of their freight cars by designated railroads.

Also, the very railroads which are given the free use of non-owned freight cars under Paragraph (5), at the expense of appellants and other carriers similarly situated, are required, by Paragraph (1) of the order, to be paid per diem without free time allowance, when their cars are used by appellants. Thus, the Sumpter & Choctaw Railroad (p. 1 of Ex. 40, R. 1168a) will receive the free use of non-owned freight cars, at the expense of the Southern Railway, but as a nonsubscriber will receive the full per diem rate without deduction, under Paragraph (1), when its 91 cars are used by appellants or any other railroad similarly situated. The Little River Railroad (p. 1 of Ex. 40, R. 1168a) which was a subscriber to the Per Diem Agreement at the time of the

hearings, would also have received the free use of non-owned freight cars at the expense of the Southern, but as a subscriber, would have received full per diem without free time allowance when its 30 cars were used by appellants or other railroads similarly situated. This road has now become a nonsubscriber without altering its condition. The order still requires that it be given all the rights of a subscriber to the Per Diem Agreement but relieves it of all the obligations of a subscriber.

For the enforced payments to be made by appellants and the enforced losses to be sustained by them under Paragraph (5) of the order, the order provides no compensation or return whatsoever to them. They are deprived of the use of their own cars either without any payment, or upon the payment of an amount less than that found reasonable by the Commission, or are required to pay the car hire bills of connecting carriers. There is no suggestion in the reports or order of the Commission that any benefit will accrue to them because of their enforced assumption of these losses and payments.

(g) In Findings 8 and 9 in the first report of the Commission (R. 93), the bases of car-hire settlement in force on certain named roads is found unreasonable and the connecting carriers of those roads are directed to make car-hire settlements with them in conformity with the preceding findings to which we have referred. All the railroads named in these two findings were involved in the cases reopened and/or consolidated with the general investigation and which are discussed at pages 401 to 439 of the Commission's first report (R. 49-87). All unexpired orders entered in those cases, in so far as they were in conflict with the order entered in Docket No. 17801, were vacated by the latter order (R. 100), thus carrying into effect the conclusions reached by the Com-

mission in Findings 8 and 9. It results that Paragraphs (1) to (5), inclusive, of the order entered by the Commission in Docket No. 17801 on July 15, 1930, represent the final views of that body with respect to the subject of car hire between common-carrier railroads.

4. Proceedings in the Lower Court.

The suit in the District Court was brought by appellants on behalf of themselves and all other carriers subject to the Interstate Commerce Act which might have an interest in the premises (R. 1), to enjoin and annul Paragraphs (2), (3) and (5) of the Commission's order. The United States and the Commission were named as defendants (R. 1), and prior to the hearing, the South Manchester Railroad Company intervened as a defendant (R. 126-128). The suit was heard by a statutory court of three judges, pursuant to the provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913 (38 Stats. at L. 220, Title 28, U. S. C. A., Sec. 47).

The petition (R. 1, *et seq.*) asserted the invalidity of Paragraph (2), (3) and (5) of the order on the ground that the requirements of those paragraphs were in excess of the Commission's powers; were arbitrary, unlawful and void; that there was no evidence in the record of the proceedings before the Commission justifying or supporting them and that they violated appellants' rights under the Fifth Amendment to the Constitution of the United States, in that they operated to confiscate appellants' property and deprive them of that property without due process of law and without compensation. The defendants filed answers (R. 119, 122, 128) alleging the validity of the Commission's order.

Upon the hearing in the lower court the entire record made before the Commission in the general investiga-

tion, Docket No. 17801, duly certified by the Secretary of the Commission, was introduced in evidence by appellants as Exhibit 1 (R. 131, 132), and there were also introduced by appellants as Exhibits 2 to 28, inclusive (R. 132-135), the entire records made before the Commission in the cases reopened and/or consolidated with the general investigation, all being certified by the Secretary of the Commission. The lower court, therefore had before it all the evidence submitted to the Commission prior to the issuance of its reports and order in Docket No. 17801.

In addition, appellants introduced Exhibits 29 to 40, inclusive, (R. 995) which exhibits showed, with respect to each petitioner, representative and typical illustrations of the effect of the order. On January 29, 1931, a final decree was entered in the lower court dismissing the petition and sustaining the order in its entirety (R. 1174). As we have said, the lower court wrote no opinion in deciding the case but filed fourteen findings of fact and four conclusions of law (R. 1169-1173). An appeal from the decree so entered by the lower court was duly taken to this court.

On this appeal, all the oral testimony taken by the Commission in Docket No. 17801 and in Docket No. 16420, *South Manchester Railroad Company* v. *New York, New Haven & Hartford Railroad Company*, one of the cases consolidated with Docket No. 17801, has been reduced to narrative form and incorporated in the printed record, under a stipulation of the parties that such narrative statement of evidence is a true and correct statement in narrative form of the oral testimony introduced in those proceedings, and sets forth in condensed form all oral testimony essential to the decision of the questions presented by the appeal (R. 1183, 1184). In addition, the printed record in this court includes certain of

the more important exhibits offered in the proceedings before the Commission and in the lower court. All of the exhibits offered in the lower court, with the exception of the oral evidence taken before the Commission in Dockets Nos. 17801 and 16420, were also certified to this court as original exhibits and are on deposit with the clerk.

5. Proceedings in This Court.

In accordance with Paragraph (1) of Rule 12 of the revised rules of this court, a statement of the grounds upon which the jurisdiction of this court is invoked was duly filed by appellants. Subsequently, they also filed a motion to advance the case for hearing. On June 1, 1931, this court entered an order finding that probable jurisdiction had been shown, and advancing the case and setting it for hearing on October 5, 1931, after the cases theretofore assigned for that day.

Specification of Errors.

Appellants make the following specification of errors:

1. The lower court erred in failing to hold that Paragraphs (2), (3) and (5) of the Commission's said order, which require appellants to pay the car accounting and car hire expenses of other common-carrier railroads and permit the use of freight cars owned by appellants by such other common carriers, all without the payment of any compensation or adequate compensation to appellants, were void and beyond the power and jurisdiction of the Commission, and in failing to hold that said paragraphs of the order operate to confiscate the property of appellants and deprive them of their property without due process of law and without compensation, in violation of their rights under the Fifth Amendment to the Constitution of the United States.

2. The lower court erred in failing to hold that the evidence in the record of the proceedings before the Commission was insufficient to support the requirements of Paragraphs (2), (3) and (5) of said order and in holding that such evidence fully supported each finding of the Commission.

3. The lower court erred in failing to hold that the evidence in the record of the proceedings before the Commission was insufficient to afford a fact basis for the requirements of Paragraphs (2), (3) and (5) of said order.

4. The lower court erred in holding that the statement of the evidence introduced in the proceedings before the Commission, as contained in the Commission's report dated January 7, 1929, fully covers the controverted issues.

5. The lower court erred in failing to hold that the classification of railroads created by the said order of the Commission was arbitrary, unreasonable and illogical and was not supported by any evidence in the record of the proceedings before said Commission.

6. The lower court erred in failing to hold Paragraphs (2), (3) and (5) of the said order void for the reason that, as shown by the evidence in the record of the proceedings before the Commission and the reports of the Commission, the requirements of said paragraphs of the order were based upon insufficient and improper evidence pertaining to an issue not involved in the proceedings before the Commission.

7. The lower court erred in failing to hold that the Commission's order is void as being arbitrary, unreasonable and illogical and unsupported by and contrary to the findings and the evidence in the case.

SUMMARY OF ARGUMENT.

I.

It is doubtless true that in this case the Commission had jurisdiction to institute the proceeding on its own motion and to prescribe such reasonable and proper rules relating to car service as were justified by the evidence, and also to prescribe the reasonable compensation to be received by each railroad for the use of its cars by another railroad. The Commission, however, does not have unlimited power to regulate interstate commerce through the making of orders relating to matters within its jurisdiction. While this court will not weigh the evidence and substitute its judgment for that of the Commission, orders entered by that body will be set aside if they are unsupported by the evidence, were made without a hearing, exceed constitutional limits, or amount to an abuse of power. If the order here involved is subject to any of these objections, it will be set aside.

II.

Paragraphs (2), (3) and (5) of the order entered by the Commission unquestionably operate to take the property of appellants and other railroads similarly situated without compensation or without adequate compensation. Neither the reports of the Commission nor its order indicate that any benefit or payment will move to appellants and other railroads similarly situated, to compensate them for the losses imposed upon them by those paragraphs of the order. Without more, the decisions of this court necessarily require that those paragraphs be set aside. The issues before the Commission involved no question of rates, divisions, costs of transportation, car service, car distribution or the obligation of railroads to

own freight cars. There is no public interest to be considered and no such interest will be affected by the decision herein. Thus, those decisions of this court modifying property rights and requiring the performance of some service without compensation have no application.

III.

The evidence in the record of the proceedings before the Commission does not justify the requirements of Paragraphs (2), (3) and (5) of the order. This evidence consisted of nothing more than the requests of individual witnesses that the railroads represented by them be allowed the concessions now extended to them under those paragraphs of the order. No reasons are assigned, either in the evidence or in the reports of the Commission, which constitute a legal justification for the requirements of those paragraphs of the order. Moreover, it is obvious that the only purpose of the Commission in making those paragraphs of the order was to effect a transfer of revenue as between railroads. This was not an issue in the case and the record does not contain the evidence upon which an order having this effect must be predicated.

IV.

The classifications of railroads made in the Commission's order are arbitrary and unreasonable. They are not supported by any evidence in the record of the proceedings before the Commission, bear no logical relation to any lawful result sought to be accomplished, are not uniform in their application, create discriminations and inequalities between railroads, are arbitrary and unreasonable, and operate to confiscate the property of appellants in violation of their constitutional rights. They are not justified by those decisions of this court sustaining statutory classifications of railroads as legitimate exercises of a State's power to regulate in the public interest.

ARGUMENT.

I.

THE POWER OF THE COMMISSION TO REGULATE INTERSTATE COMMERCE IS NOT ABSOLUTE. ANY ORDER MADE BY IT, PRESUMABLY IN THE EXERCISE OF ITS JURISDICTION, WILL BE ENJOINED IF IT IS UNSUPPORTED BY EVIDENCE, EXCEEDS CONSTITUTIONAL LIMITS, IS ARBITRARY AND UNREASONABLE OR FOR ANY OTHER REASON AMOUNTS TO AN ABUSE OF POWER.

Jurisdiction over the matter of car hire as between railroads subject to the Act to Regulate Commerce is conferred upon the Commission by Paragraphs (10) to (14), inclusive, of Section 1 of that Act (U. S. C. A., Title 49, pp. 101 to 115). Paragraph (10) defines car service as specifically including the use, control, supply, movement, distribution, exchange, interchange and return of cars and other vehicles used in the transportation of property. Paragraph (11) requires every carrier to furnish adequate car service and establish just and reasonable rules and regulations with respect thereto.

Paragraph (12) requires every carrier to make a just and reasonable distribution of coal cars among mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply, and prescribes some detail to be observed in making such distribution. Paragraph (13) authorizes the Commission to require all carriers to file with it their rules and regulations with respect to car service and to incorporate such rules and regulations in tariffs. Paragraph (14) gives the Commission authority after hearing, on complaint or on its own

initiative, to establish reasonable rules, regulations and practices with respect to car service, including the compensation to be paid for the use of any car not owned by the carrier using it.

Under these sections of the law it has been held that the Commission has power to regulate the distribution of freight cars and that this power is exclusive. *United States* v. *New River Company,* 265 U. S. 533. These paragraphs of the statute were also considered in *Peoria & Pekin Union Railway* v. *United States,* 263 U. S. 528 and in *Assigned Car Cases,* 274 U. S. 564. It cannot be doubted that under the law, the Commission had jurisdiction to institute this proceeding on its own motion; to prescribe such reasonable and proper rules relating to car service as were justified by the evidence, and also to prescribe the reasonable compensation to be received by any railroad, a party to the proceeding, for the use of its cars by another railroad.

This power of the Commission, however, is not unlimited. It is necessary that the record of the proceedings before the Commission contain evidence supporting the requirements of its order. The order may not confiscate the property of appellants in violation of their constitutional rights, or deny them due process of law. The requirements of the order must be reasonable and not be arbitrary or amount to an abuse of power. If the order is subject to any of these objections, it will be set aside.

It is well settled that in a proceeding to set aside and enjoin an order of the Commission, this court will not weigh the evidence and substitute its judgment for that of the Commission, but in every case so holding, the limitations upon the Commission's power to which we have referred have been enumerated. The rule is well stated in *Manufacturers Railway Company* v. *United States,*

264 U. S. 457, 481, where this court said that administrative orders of the Commission,

> "operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by the evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."

This statement of the rights and powers of the Commission in making orders and the limitations imposed upon it by law has been approved by this court in many cases. *Assigned Car Cases*, 274 U. S. 564; *Virginian Railway Company* v. *United States*, 272 U. S. 658; *Western Chemical Company* v. *United States*, 271 U. S. 268; *United States* v. *New River Company*, 265 U. S. 533; *New England Divisions Case*, 261 U. S. 184.

In *United States* v. *Chicago, etc. R. Co.*, 282 U. S. 311, decided in January, 1931, and involving the validity of an order of the Commission, this court said at page 327:

> "The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 571-572; *Adair* v. *United States*, 208 U. S. 161, 180."

We do not contend that the order here under attack was made without a hearing. Numerous hearings were held and a complete record was made. We do contend that Paragraphs (2), (3) and (5) of the Commission's order exceed the constitutional limits within which the Commission must function, in that they operate to confiscate appellants' property and require its taking without compensation to them and without due process of law; that the evidence before the Commission does not

support the conclusions reached in those paragraphs and that they are arbitrary, unreasonable, not supported by the evidence and amount to an abuse of power. If these things are true, those paragraphs of the order should be set aside. The Urgent Deficiencies Appropriation Act of October 22, 1913 (38 Stat. L. 220; Title 28 U. S. C. A. Sec. 47) expressly authorizes a suit to set aside an order of the Commission "in whole or in part." This part of the law was considered in *United States* v. *Chicago, etc. R. Co., supra,* at page 328.

II.

IT MUST BE CONCEDED IN THIS CASE THAT PARAGRAPHS (2), (3) AND (5) OF THE COMMISSION'S ORDER OPERATE TO TAKE THE PROPERTY OF APPELLANTS AND OTHER RAILROADS SIMILARLY SITUATED WITHOUT COMPENSATION OR WITHOUT ADEQUATE COMPENSATION. WITHOUT MORE, IT IS PLAIN THAT THESE PARAGRAPHS OF THE ORDER SHOULD BE SET ASIDE.

The issues in the proceedings before the Commission were closely defined. The specific matter put in issue by the Commission's order instituting the investigation was the rules for car-hire settlement between common-carrier railroads. Rates for transportation and divisions of those rates were not in issue (R. 152, 220, 288, 292, 307, 315). The obligation of any railroad to own freight cars was not in issue (R. 228). Nor were individual costs of transportation involved (R. 175).

Nor is the matter of car supply to shippers and consignees involved in the proceeding. Appellants and other members of the American Railway Association have always conceded their obligation to permit the use of their freight cars by other carriers. As early as 1911, the

Commission held, in *Missouri & Illinois Coal Co.* v. *Illinois Central R. Co.*, 22 I. C. C. 39, that the Interstate Commerce Act required the interchange of freight cars between carriers subject thereto and that a carrier could not refuse to allow its equipment to leave its rails. This conclusion was affirmed in *Car Supply Investigation*, 42 I. C. C. 657, in which it was said that the Commission should be given statutory power to prescribe rules to govern the interchange of equipment. Since then it has been given this power in Paragraphs (10) to (14), inclusive, of Section 1 of the Act (U. S. C. A., Title 49, pp. 101 to 115).

And without regard to the requirements of the law, it is a practical necessity that freight cars be interchanged freely among all railroads. Certainly, the business of the country could not be carried on if this was not done. In *Car Shortage Investigation*, 12 I. C. C. 561, decided in 1907, the Commission said at page 573:

> "It is not many years since the railroad which originated freight transferred at its junctions to the cars of the connecting roads. Each railroad was thus made to supply its own equipment. This was an uneconomical and time wasting method, and so out of their own necessities and to give a prompter service the railroads developed the practice which generally obtains today of permitting cars to pass onto the tracks of their connecting roads and making a per diem charge therefor. Under this system the present method of hauling freight over several connecting lines has made possible the great body of through transportation which is perhaps the most distinctive feature of American railroading."

And at p. 576 it is said:

> "The traffic of this country cannot be moved in the fashion which obtained in the early days of railroading when transfers were universal at junction points."

And in *Missouri & Illinois Coal Co.* v. *Illinois Central R. Co., supra,* it was said at page 44:

> "The commerce of the country is regarded as national, not local, and the railroads are required to serve the routes which they have established, or which they may have been required to establish, without respect to the fact that this may carry their equipment beyond their own lines."

Our only claim in this respect is that for the required use of our cars by other carriers, proper compensation should be paid. Realizing that the matter of car hire only involved railroads, the Commission named railroads as the only respondents in the proceedings before it and they are the only parties to which the order is directed With one exception, no evidence was offered on any hearing, by any member or representative of the general public. The one exception is the testimony of a representative of automobile manufacturers who testified with respect to a matter not involved on this appeal (R. 855, 856). Thus, the only matters for decision by the Commission were the rules under which freight cars were interchanged between railroads, and the compensation to be paid by a railroad for a car used but not owned by it.

In this case the taking of appellants' property is perfectly evident. Under Paragraph (2) of the order they will be required to pay the car hire bills of certain of their connections, incurred by those connections, because of their use of cars not owned by them, in performing terminal switching service. Under Paragraph (3) they will be required to assume the car accounting expense of certain of their connections. Under Paragraph (5) they are neither compelled to permit the use of their equipment by designated carriers, without compensation or without adequate compensation, or to pay the car hire expenses of those connections, incurred in the operation

of their own properties. The order of the Commission is specific in requiring these expenditures by appellants and neither the reports or order of the Commission indicate that any benefit will accrue to them as a result thereof. In the absence of facts completely justifying this result, the law plainly requires that these paragraphs of the Commission's order must be annulled.

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation (U. S. C. A. Part 2, Constitution, pp. 517, 546). The prohibition of this amendment has been held to constitute a limitation upon national action. *Hunter* v. *Pittsburgh*, 207 U. S. 161, 176. Its purpose is to give the same protection against Federal action as is afforded by the Fourteenth Amendment with respect to state action. *Tonawanda* v. *Lyon*, 181 U. S. 389, 391; *Cass Farm Company* v. *Detroit*, 181 U. S. 396, 398. The words "due process of law" mean the same thing in both the Fifth and Fourteenth Amendments. In the Fifth Amendment the words constitute a limitation on Federal action, and in the Fourteenth a limitation on state action. *Hurtado* v. *California*, 110 U. S. 516, 535; *Bartlett Trust Company* v. *Elliott*, 30 Fed. (2d) 700; *United States* v. *Armstrong*, 265 Fed. 683.

It cannot be doubted that the right of ownership of railway property is entitled to the protection of constitutional guarantees. *Western Union Telegraph Company* v. *Pennsylvania Railroad*, 195 U. S. 540, 570; *Atlantic Coast Line Railway Company* v. *Commission*, 206 U. S. 1, 20; *Missouri Pacific Railway* v. *Nebraska*, 217 U. S. 196, 206; *Northern Pacific Railway* v. *North Dakota*, 236 U. S. 585, 595.

Many cases have been decided on the question of what constitutes a taking of property, without due process of law under the Fifth and Fourteenth Amendments to the Constitution. In one of the earlier cases, the *Railroad Commission Cases*, 116 U. S. 307, which was a suit to enjoin the operation of state statutes regulating railroad rates, this court said with respect to the powers of a state under the Fourteenth Amendment (p. 331):

> "From what has been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

In *Chicago, Milwaukee & St. Paul R. Co.* v. *Minnesota*, 134 U. S. 418, the railroads contested an order of the Minnesota Commission, entered under authority of a state statute. This court said at page 458:

> "If the company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

The case of *Reagan* v. *Farmers Loan & Trust Company*, 154 U. S. 362, is a leading case on this subject. It was an action on behalf of certain railroad stockholders, bringing into question the propriety and validity of the

Texas Railroad Commission law. At page 399 this court said:

"These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body or the public as a whole) operates to divest the other party of any rights of person or property. * * * the forms of law and the machinery of government, with all their reach and power, must in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

At page 410 it was further said:

"The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain. If the State were to seek to acquire the title to these roads under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporations of just compensation, that compensation being the value of the property as it stood in the markets of the world and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take, not the title but the use for the public benefit at less than its market value?"

And in concluding upon the subject, this court said at page 412 of its decision that:

"justice demands that everyone should receive some compensation for the use of his money or prop-

erty if it be possible without prejudice to the rights of others."

In *Missouri Pacific Railway* v. *Nebraska*, 164 U. S. 403, which was an appeal from an order of the Nebraska Commission requiring the railroad to furnish part of its right of way for elevator construction, this court said at page 417:

> "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of the opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the Fourteenth Amendment of the Constitution."

In *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, which was an appeal from a condemnation award made under state statute, this court said at page 236:

> "Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

In *Union Bridge Co.* v. *United States*, 204 U. S. 364, which was an action by the Government under federal authority, to require the making of certain changes in a bridge over a navigable stream, the case of *Chicago, Burlington & Quincy Railroad* v. *Commissioners*, 200 U. S.

561, was approved and the following quotation from that case was included in the opinion at page 396:

> "The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the government, Federal or State, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner (citing cases). If the means employed have no real substantial relation to public objects which government may legally accomplish, if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. *Minnesota* v. *Barber*, 136 U. S. 313, 320."

In *Chicago, M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491, the state sued to collect a statutory penalty because the upper berth in a sleeping car had been let down, although not sold, contrary to the state statute. This court held that the statute was unconstitutional, as taking propery without compensation, saying at page 499:

> "For the state could not authorize the occupant of the lower berth to *take* salable space without pay, neither can the present statute compel the company to *give* that occupant the free use of that space until it is actually purchased by another passenger. The owners' right to property is protected even when it is not actually in use, and the Company cannot be compelled to permit a third person to have the free use of such property until a buyer appears."

And at page 500 it was said:

> "But if the statute is not a reasonable exercise of the police power and yet operates to take property, such taking cannot be justified on the ground that the Company *may* be able to secure an increase in rates. For, without considering any other question

involved, it is sufficient to say that the taking and a fixed right to compensation must coincide, though in some cases, the time for payment may be delayed."

And at page 501, this court said:

"The right of the State to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management or the taking of the carriers' property without compensation."

Other cases reiterating these principles of law are *Dow* v. *Biedelman*, 125 U. S. 680; *Budd* v. *New York*, 143 U. S. 517; *Monongahela Co.* v. *United States*, 148 U. S. 312; *St. Louis & San Francisco Railroad Co.* v. *Gill*, 156 U. S. 649; *Smyth* v. *Ames*, 169 U. S. 466; *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79; *A. C. L. R. Co.* v. *Commission*, 206 U. S. 1; *Twining* v. *New Jersey*, 211 U. S. 78; *Adair* v. *United States*, 208 U. S. 161; *Missouri Pacific Railway* v. *Nebraska*, 217 U. S. 196; *Oregon, etc. R. Co.* v. *Fairchild*, 224 U. S. 510; *Southern Railway Co.* v. *Shealy*, 18 Fed. (2nd) 784.

Nor can confiscation be disguised as regulation, for in *A. C. L. R. Co.* v. *Commission*, 206 U. S. 1, this court said at page 20:

"Wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment."

Nor can the public interest be made to serve as an excuse for confiscation. In *Northern Pacific Railway Company* v. *North Dakota*, 236 U. S. 585, a suit to enjoin a state statute fixing the rates on coal, this court said at page 595:

"The public interest cannot be invoked as a justification for demands which pass the limits of reason-

able protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement."

The foregoing cases may be considered as definitely stating the law of the land with respect to the taking of private property without due process of law, as that term is used in the Fifth Amendment to the Constitution. And this is so whether the taking is for public or private use. In the *Railroad Commission Cases*, 116 U. S. 307, and *Smyth* v. *Ames*, 169 U. S. 466, a taking for public use was specifically condemned, and in *Missouri Pacific Railway* v. *Nebraska*, 164 U. S. 403, and *Little Falls Co.* v. *Ford*, 229 N. Y. Supp. 445, a taking for private use was also condemned.

Under these circumstances, the decision of this court in *St. Louis & O'Fallon Railroad Co.* v. *United States*, 279 U. S. 461, prescribes the duty of the Commission in a case like this. That case was a suit to set aside a valuation order of the Commission, and in setting the order aside the court said at page 487:

> "In the exercise of its proper function this Court has declared the law of the land concerning valuations for rate-making purposes. The Commission disregarded the approved rule and has thereby failed to discharge the definite duty imposed by Congress. Unfortunately, proper heed was denied the timely admonition of the minority—'the function of this commission is not to act as an arbiter in economics, but as an agency of Congress, to apply the law of the land to facts developed of record in matters committed by Congress to our jurisdiction.' * * *
>
> Whether the Commission acted as directed by Congress was the fundamental question presented. If it did not, the action taken, being beyond the authority granted, was invalid."

We are aware of those decisions of this court which apparently permit the taking of railroad property without compensation under some circumstances. The rule

in such instances is stated in *Missouri Pacific Railway Company* v. *Nebraska*, 217 U. S. 196, where this court said at page 206:

> "Now it is true that railroads can be required to fulfil the purposes for which they are chartered and to do what is reasonably necessary to serve the public in the way in which they undertake to serve it, without compensation for the performance of some part of their duties that does not pay. *Missouri Pacific Railway Co.* v. *Kansas*, 216 U. S. 262. It is also true that the States have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the power commonly called the police power. But railroads after all are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away."

This rule is based upon a duty of the railroads to the public. That is to say, they are obliged under their duty to the public, either charter or otherwise, to do some things in the interest of public safety or to serve some other public interest, and for which, considered alone, they do not receive adequate compensation.

Illustrations of this rule are found in a number of cases. In *N. Y. & N. E. Railroad* v. *Bristol*, 151 U. S. 556, an order of a State Commission requiring a separation of grades was sustained, the court holding, at page 567, that the constitutional rights of the railroad company were not violated by requirements securing public safety. In *New Orleans Co.* v. *New Orleans*, 281 U. S. 682, the suit was brought to set aside an ordinance requirement of the city with respect to certain track and crossing construction. This court said at page 687:

> "It is elementary that enforcement of uncompensated obedience to a regulation passed in the legiti-

mate exertion of the police power is not a taking of property without due process of law."

In *A. C. L. R. Co.* v. *Commission*, 206 U. S. 1, which was a suit to set aside an order requiring the giving by the railroad company of certain local train service, the order was sustained as not unreasonable, even though the train was run at a loss. The court based its decision on the fact that it was part of the general duty of the railroad company to furnish such service.

On the other hand, in *Mississippi* v. *M. & O. R. Co.* 224 U. S. 388, the railroad company attacked an order of a State Commission requiring the restoration of six passenger trains which had been discontinued. This court upheld the power of the State to regulate such matters, even when in some cases the service was to be performed at a loss, but it further held that the order must be reasonable and that even in such case a railroad was entitled to the protection afforded it by its constitutional rights. In that case the order was annulled.

As lately as May, 1931, this court in *Atchison, Topeka & Santa Fe Railway Company* v. *Railroad Commission*, 283 U. S. 380, reannounced this rule. At pages 394 and 395 it is said:

"The principle that the State, directly or through an authorized commission, may require railroad companies to provide reasonably adequate and suitable facilities for the convenience of the communities served by them, has frequently been applied. *Wisconsin, Minn. & Pac. R. C.*, v. *North Carolina Corp. Comm.*, 206 U. S. 1, 26, 27; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 279; *Seaboard Air Line Ry. Co.* v. *Railroad Comm.*, 240 U. S. 324, 327; *Mississippi R. R. Comm.* v. *Mobile & Ohio R. Co.*, 244 U. S. 388, 390, 391; *Erie R. Co.* v. *Public Utility Commrs.*, 254 U. S. 394, 409, 410. Railroad carriers may be compelled by state legislation to establish stations at proper places for the convenience of their patrons. *Minneapolis & St. L. R. Co.* v. *Minnesota*,

193 U. S. 53, 63. They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings may reasonably be insisted upon, whether constructed before or after the building of the railroads, *Missouri, Kansas & Texas Ry. Co.* v. *Oklahoma*, 271 U. S. 303, 307. But the power to regulate is not unlimited. 'It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business.' *Norfolk & Western Ry. Co.* v. *Public Service Comm.*, 265 U. S. 70, 74; *Mississippi Railroad Comm.* v. *Mobile & Ohio R. Co., supra.*

These decisions, however, are not applicable in the case at bar. As we have heretofore pointed out, no shipper or consignee has any interest in this litigation. Rates of transportation are not involved. The financial status of the railroads, either individually or as a whole, is not in issue. There is no question of divisions of rates collected from the public for transportation. There is no issue of car supply or car distribution, since appellants admit their obligation to permit the use of their cars by other railroads, subject to their constitutional right to receive proper compensation. No matter what the outcome of this case, no member of the public will be prejudiced. Transportation service will be rendered as before. Freight cars will still be available for the transportation of all freight at rates which will not be changed as the result of any decision herein.

This results from the nature of the proceedings. No member of the public is directly interested in whether or not some railroads pay reclaim to other railroads; whether the car accounting expense of some railroads is paid by other railroads, or whether the cars of some railroads are used by other railroads without payment therefor. These circumstances are not of importance in the dealings between the railroads and the public. It was undoubtedly in recognition of this fact that the Commis-

sion limited the list of respondents to common carrier railroads.

A further circumstance distinguishing this case from the line of cases to which we have just referred is that in those cases there was involved either a charter or other obligation by the railroad to furnish the service in issue, or a question of the proper exercise of police power by a public authority. Neither of these factors are present in the case at bar. There is no charter or other obligation on appellants and other railroads similarly situated, to directly pay any part of the operating expenses of other railroads or to turn over their freight cars to such railroads without compensation. These matters do not affect public safety or convenience in any respect.

Nor is there involved any question of police power. The order of the Commission cannot be an exercise of such power since it has no such power. The issues presented in the case at bar must, therefore, be judged from the standpoint of those cases which uniformly condemn the taking of any property for public or private use without the payment of just compensation therefor.

From the reports of the Commission, it is obvious that the burdens imposed upon appellants under the order are imposed for the purpose of benefitting certain railroads at the expense of appellants and other railroads similarly situated. This also was the situation in *Chicago, St. Paul, Minneapolis & Omaha Railway* v. *Holmberg*, 282 U. S. 162, in which the Railway Company attacked an order of the State Railway Commission of Nebraska requiring the Railway Company to establish an underground cattle pass under its tracks. In reversing the order of the Commission and the decision of the Supreme Court of Nebraska affirming it, this court said at page 167:

"It is plain that the Commission proceeded upon

the assumption that the statute authorized it to compel plaintiff to establish the underground pass for the convenience and benefit of defendant in the use of his own property, and that that alone was the ground and purpose of the order. The application thus given to the statute deprives plaintiff of property for the private use and benefit of defendant, and is a taking of property without due process of law, forbidden by the Fourteenth Amendment. *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196; *Great Northern Railway Co.* v. *Minnesota*, 238 U. S. 340; *Great Northern Railway Co.* v. *Cahill*, 253 U. S. 71."

The Commission has done here exactly the same thing done by the Nebraska Commission in the Holmberg case. It has assumed that Paragraphs (10) to (14), inclusive, of Section 1 of the Interstate Commerce Act authorize it to make rules with respect to car hire settlements for the benefit of certain railroads and at the expense of other railroads. Such a construction and application of the law should be condemned.

III.

THERE IS NO EVIDENCE IN THE RECORD OF THE PROCEEDINGS BEFORE THE COMMISSION JUSTIFYING THE REQUIREMENTS OF PARAGRAPHS (2), (3) AND (5) OF THE ORDER.

As we have said, a large mass of evidence was offered upon the hearings conducted by the Commission. Witnesses representing a substantial number of so-called "short lines" appeared and testified with respect to the car-hire arrangements under which they were operating. Since each witness acccommodated his testimony to the requirements of his road, almost every one desired something different, but they were a unit in proposing that their roads be given the free use of freight cars which they did not own.

Generally speaking, this testimony all followed the same lines, and a reference to the testimony of a few of the witnesses will serve to illustrate the whole body of the record. In considering the evidence it should be remembered that all railroads which were respondents in the proceedings before the Commission were common carriers, and that as such, all of them, subscriber and nonsubscriber roads, were entitled to the same rights and subject to the same obligations.

(a) *Paragraph* (2) *of the order.*

This is the paragraph which requires that the same reclaim be granted to nonsubscribers as is granted to subscribers to the Per Diem Agreement. The York Utilities Company, referred to at page 390 of the Commission's first report (R. 38) is typical of roads which will be benefitted by this requirement and the testimony of its witness is representative. The testimony is reproduced at pages 182 to 184 of the printed copy.

The burden of it is that this nonsubscriber road performs a terminal switching service for the Boston & Maine but receives no reclaim; that as a nonsubscriber it is required to pay $1 a day for every non-owned car used by it and that it can not afford to do this; that the Boston & Maine makes more money on cars handled by the York Utilities Company in terminal switching service than it makes on cars which it handles itself in terminal switching service, since in the first case it receives $1 a day for the use of the car and in the second case has to furnish the car itself or at its own expense. As a matter of fact, however, this railroad had in effect a demurrage rate which it had increased by the amount of per diem paid by it, so that during the time it was refusing to pay per diem to the Boston & Maine it was collecting that per diem from shippers and consignees

in the demurrage rate. Its specific request was that it be allowed to use non-owned freight cars for three days without payment therefor.

Evidence of this type, together with the conceded fact that subscriber railroads allow reclaim as between themselves, must have been the fact basis upon which the requirements of Paragraph (2) are founded, and is, we submit, insufficient. In the entire discussion of reclaim contained in the Commission's first report, the relations between subscribers and nonsubscribers are only once referred to. This is on page 381 of the Commission's first report (R. 29) where it is said that in order to induce subscription to the Per Diem Agreement, the per diem rules have, since 1913, restricted the reclaim allowance to subscriber railroads. It is impossible, therefore, to determine from the Commission's report just why it was concluded that the same reclaim should be allowed to nonsubscriber roads as to subscribers. No reason for this conclusion is assigned, either in the reports or order. It will also be observed that the prohibition against the allowance of reclaim to nonsubscriber roads is only found to be unreasonable (R. 92). There is no suggestion or finding that it produces an unlawful discrimination.

Dealing with the reasons which may have moved the Commission to the conclusion reached by it, it is obvious that the desire of a nonsubscriber railroad to receive terminal switching reclaim is not sufficient. There must be something more than this. Some sort of a legal obligation to allow such reclaim must rest upon the subscriber road. It is equally obvious that the claimed inability of a railroad to pay for its use of non-owned freight cars in terminal switching service does not justify the requirement that its connecting carrier make the payment. There must be more than this.

The car-hire obligations of a common-carrier railroad have no different status than its obligation to pay the wages of its employes. Car hire is nothing more than an operating expense of a railroad and the law does not yet require that any carrier or designated class of carriers must sustain the obligation of directly paying operating expenses incurred in the operation of another railroad. If certain railroads do not receive sufficient net income with which to pay these expenses, the law provides other methods of increasing it. Moreover, the record does not show that appellants and other subscriber railroads are financially better off than the nonsubscribers benefitted by Paragraph (2).

Nor does the fact that subscriber roads allow terminal switching reclaim as between themselves justify the requirements of Paragraph (2). As we have pointed out, a subscriber road receiving terminal switching reclaim gives something for it. It allows reclaim when conditions are reversed, pays per diem for its use of nonowned freight cars and accounts for its use of such cars direct to the owner thereof. These things are not required to be done by a certain class of nonsubscriber roads which will receive reclaim under Paragraph (2). Such nonsubscribers will not be required to account for cars used by them if they can qualify under Paragraph (3). They will not be required to pay reclaim. Nor will they have to pay per diem if they can bring themselves within Paragraph (5). Under these circumstances, a difference in treatment between nonsubscriber roads and subscriber roads is justified.

The Commission may have felt that the requirement of Paragraph (2) removed discrimination, although it was not found that the failure of appellants and other roads similarly situated to allow terminal switching re-

claim to nonsubscriber roads was discriminatory. But it cannot be sustained on this ground. Both the Commission and this court have held that there can be no discrimination if conditions are dissimilar. *Ayrshire Coal Co.* v. *Southern R. Co.*, 118 I. C. C. 531. *Interstate Commerce Commission* v. *B. & O. R. Co.*, 145 U. S. 263, 276, 281. In this case, the evidence is clear that different conditions obtain in the allowance of terminal switching reclaim as between subscriber roads and the allowance of this reclaim as between nonsubscriber and subscriber roads. Moreover, even if the facts had justified a finding of discrimination, the paragraph must fall, since it allows no alternative to appellants and other railroads similarly situated.

In *Great Northern Railway Company* v. *Minnesota*, 238 U. S. 340, the Railway Company attacked an order of the Minnesota Railroad & Warehouse Commission directing the erection of a stock scale at one of its stations. It appeared that the Railway Company maintained such scales at other stations, but contended that even if this produced a discrimination, the Minnesota Commission acted arbitrarily and unreasonably in seeking to eliminate the discrimination by requiring the construction of another scale without opportunity to the Railway Company to accomplish the same result through discontinuing the scales already installed. With respect to this point, this court said at pages 346 and 347:

> "This contention is sound and must be sustained. Conceding power to inhibit discrimination the Commission could not exercise it unreasonably by needlessly taking property or, what comes to the same thing, obligating incurrence of expense wholly unnecessary. It by no means follows, simply because a railroad voluntarily supplies a convenience at some stations which attracts trade, that it can be commanded positively to do likewise at other places along the line. A railroad's possessions are sub-

ject to its public duty but beyond this and within charter limits, like other owners of private property, it may control its own affairs. Discontinuing the use of existing scales would abate the alleged discrimination and probably entail little, if any, outlay. The Commission's order precluded use of this method to bring about lawful conditions and therein, we think, was plainly arbitrary and unreasonable. *Missouri Pacific Railway* v. *Nebraska*, 164 U. S. 403, 417; *Donovan* v. *Pennsylvania Company*, 199 U. S. 279, 293; *Missouri Pacific Railway* v. *Nebraska*, 217 U. S. 196, 206."

The same situation exists in this case. Any discrimination against nonsubscriber roads resulting from the allowance of terminal switching reclaim as between subscriber roads, could have been cured by the complete discontinuance of the allowance of such reclaim.

Moreover, even if it be assumed that Paragraph (2) is intended to eliminate an inequality or discrimination as between subscriber roads on the one hand and nonsubscriber roads on the other, it fails of its purpose. It gives nonsubscribers the right to terminal switching reclaim, but they are not required to allow such reclaim either by the order or by the Per Diem rules. Thus, any burden that such nonsubscriber roads may have rested under because of their failure to receive terminal switching reclaim is only transferred from them to appellants and other subscriber roads which are required to allow such reclaim. Surely, such action cannot be said to cure any discrimination that existed. If it existed before, it exists under the Commission's order.

It may be argued that it is an injustice to require nonsubscriber roads to pay per diem without receiving terminal switching reclaim, since the record does show that switching charges generally are not high enough to permit such payment, and that they cannot practically be increased. Such an argument, however, could not

justify the requirements of Paragraph (2) under the facts of record. Nonsubscriber roads have always been able to secure such reclaim by paying the price subscriber roads have always paid. They have always been able to secure it by agreeing to pay per diem for their use of non-owned freight cars, do their own car accounting and grant reclaim when the Per Diem rules required it. Paragraph (2) only transfers any burden under which nonsubscriber roads may have rested, to appellants and other subscribers, but without allowing appellants and other subscribers any method of avoiding it.

Thus, we may concede, for the purpose of the argument, that neither the Southern Railway or the Buffalo-Union Carolina Railroad (p. 2 of Ex. 40, R. 1168b) receive sufficient income from their switching charges to pay per diem on non-owned cars used by them in terminal switching service. Neither road allowed terminal switching reclaim to the other and consequently both lost money on the service (R. 648-650). Paragraph (2) takes care of the Buffalo Union-Carolina in this situation, by requiring that the per diem on cars used by it in terminal switching service be paid by the Southern, or that the Southern furnish its cars for that service without compensation. The loss which the Southern has always sustained in fulfilling its common-carrier obligation is not only still sustained by it, but under Paragraph (2) is substantially enlarged because of its enforced assumption of an operating expense arising out of the operation of the Buffalo Union-Carolina. Nor does the order permit any escape by the Southern from this obligation.

It is clear that Paragraph (2) of the order takes appellants property. It is equally clear that they get nothing to compensate them for that taking. Since there

is no evidence which justifies such a taking, if indeed an evidence could justify it, the results produced by the paragraph come within the prohibition so often expressed by this court. We submit that the paragraph should be set aside.

(*b*) *Paragraph* (3) *of the Order.*

This is the paragraph which requires that the car accounting expense of railroads less than 100 miles in length and which return railroad-owned freight cars to the road from which they were received, be assumed by their connecting carriers. The Oneida & Western Railroad, referred to by the Commission at page 399 of its first report (R. 47) is representative of the class of railroads which will be benefitted under this paragraph of the order, since it is only 30 miles long and returns all cars to the Southern, its only connection. The testimony of its witness appears at pages 667 to 671 of the printed record.

From that testimony it appears that at the time of the hearings the road was a subscriber to the Per Diem Agreement, having become a subscriber because of its desire to get per diem on ten cars owned by it when they were used by other carriers. At the time of the hearings, it was receiving reports showing the use of its cars by other railroads and was receiving per diem on those cars under the provisions of the Per Diem Code. Its complaint was that in order to receive such reports and per diem and other benefits of its subscription, it was compelled to spend some money in making reports to the owners of freight cars which it used, and in other ways. This expenditure was not much of a burden to this particular railroad, since it earned 5.57% in 1926, on a valuation of $1,400,000 (R. 669) and about 4.75% in 1925 (R. 671).

The Bennettsville & Cheraw Railroad will also benefit under Paragraph (3). The testimony of its witness appears at pages 663 to 666 of the printed record. This road is a subscriber 32 miles in length. It connects with the Seaboard Air Line Railway and Atlantic Coast Line Railroad, but can return to these roads all cars received from them, since it handles no traffic from one to the other. It became a subscriber road in order to get reclaim, but complains of the obligation to report its use of freight cars to the owner thereof. It also had net railway operating income in 1926 of almost $20,000 on a value of approximately $350,000.

Evidence of which the foregoing is typical, together with the conceded facts that appellants and other subscriber roads accounted for non-owned freight cars used by nonsubscriber roads, and that during Federal control, so-called "short lines" were attached to their connecting carriers for purposes of car-hire settlement, constitutes all of the evidence on the subject in the record of the proceedings before the Commission. Such evidence and the facts we have stated must have furnished the fact basis for the conclusion expressed in Paragraph (3), if the Commission confined its consideration to matters of record.

As in the case of Paragraph (2), there is nothing in the Commission's reports and order which enlightens us as to the reasoning upon which it reached the conclusion expressed in Paragraph (3). The evidence of record, however, certainly does not justify that conclusion. The expressed desire of some railroads to escape the expense of accounting for non-owned freight cars used by them is surely not sufficient. There must be something more than this.

Nor can the possible financial difficulties of [illegible]lroad

be urged in justification of Paragraph (3). If a railroad's revenue is insufficient to enable it to pay the expenses incurred in its operation, other methods are provided for increasing that revenue. Its rates may be increased or its divisions may be increased, but certainly its net revenue may not be increased by the imposition of one item of its operating expense upon its connecting railroads. This is particularly true in this case, since the rates, divisions and financial condition of the railroads were not in issue.

Nor does the fact that subscriber railroads now perform this accounting service for connecting nonsubscriber railroads justify the requirements of Paragraph (3). Appellants and other railroads similarly situated have a substantial reason for doing the accounting for cars used by their connecting nonsubscriber roads. The Per Diem rules require reports to a car owner for the use of its cars by other railroads to be made only by subscriber roads. A nonsubscriber road, not being bound by those rules, makes no such reports. In order, therefore, that the owner of a freight car may know who is using his car and that he may be protected in his undoubted right to receive compensation for such use, subscriber roads, as between themselves, have voluntarily agreed to make the necessary reports. Such action enables subscriber roads to permit the use of their cars by nonsubscriber roads but requires them to assume an obligation which should have been imposed by the Commission in this case upon all railroads.

But this voluntary action of appellants and other subscriber roads, agreed to because of the necessities of the case, does not support the requirements of Paragraph (3). There was no evidence that it created any unlawful discrimination, and the Commission has not found that any such discrimination existed. And even if it

had been found to exist or was proven by the evidence, Paragraph (3) must still fall, since it does not extend to appellants and other railroads similarly situated, the right to cure such discrimination by discontinuing their practice of accounting to each other for freight cars used but not owned by connecting nonsubscriber railroads. *Great Northern Railway Company* v. *Minnesota*, *supra*.

Nor does the action of the Director-General during Federal control constitute a good precedent. As we have pointed out, allowances were only made by him to those railroads which signed contracts waiving all claims against the Railroad Administration. He received value for what he gave, whereas appellants will receive nothing.

The action of appellants and other subscriber railroads in requiring all subscribers to do their own car accounting is found by the Commission to be uneconomical and unreasonable (R. 92). This means that a requirement that every common-carrier railroad pay its own operating expenses is uneconomical and unreasonable, since the cost of accounting for freight cars used but not owned is nothing but an operating expense of every railroad. The Commission has condemned this requirement, not because of any stated violation of law, but apparently for the sole reason that it thinks some other practice would be better and would simplify accounting.

Conceding the Commission's broad authority, we submit that it may not deprive appellants of their property for such reasons, and that its action in that respect is so arbitrary that it should not be sustained. Paragraph (3) of the order unquestionably confiscates the property of appellants and other railroads similarly situated, in

that it requires the expenditure of their money in the payment of an operating expense of certain of their connecting lines, without any return or compensation whatsoever to them and without justification in the law or in the evidence. It is confiscation disguised as regulation, and as such is prohibited by those cases which we have heretofore cited. In the words of the opinion in *A. C. L. Ry.* v. *Commission,* 206 U. S. 1, 20, it is

> "not a regulation, but an infringement upon the right of ownership."

We submit that the paragraph should be set aside.

(c) *Paragraph* (5) *of the Order.*

This is the paragraph which extends to designated railroads the right to use freight cars belonging to other railroads in line-haul traffic, either without the payment of any compensation or upon the payment of compensation less than that found reasonable by the Commission; or requires them to expend their money in paying the car hire expenses of such connections. The paragraph is in two parts, the first relating to general service freight cars and the second to cars furnished for return coal loading. For convenience, we will deal with the two parts of the paragraph separately.

Dealing first with the free use of general service cars, almost every railroad which owned no interchangeable freight cars, and whose witnesses testified upon the hearings before the Commission, desired this free use of non-owned freight cars in some form. In the testimony of these witnesses, various periods of such free use were asked for, the period varying only because each witness was interested in getting enough free use of non-owned freight cars to permit his railroad to use them without payment.

We may refer to the requests of certain roads as being typical and illustrative of what was desired and the reasons therefor. The Bloomsburg & Sullivan Railroad wished the free use of each non-owned freight car for four days in line-haul traffic because such an allowance was analogous to the switching reclaim allowances made between subscribers and because this allowance would practically eliminate its car hire expense. Its witness did not feel that it had enough money to pay car hire but was willing to pay if it had the money (R. 368-371). The Lake Champlain & Moriah Railroad wished to settle car hire with its connecting road on a demurrage basis as this would permit it to use non-owned freight cars without payment. It was in favor of anything that would permit it to use non-owned cars for nothing and felt that it was entitled to this concession because all its originated traffic was delivered to the Delaware & Hudson Company, its only connecting carrier (R. 179-182).

The Arcade & Attica Railroad desired two days' free use of non-owned freight cars because this allowance would reduce its car hire bill to practically nothing. It asked for this allowance because it was not making enough money, but was willing to pay car hire if its revenue was increased. It wanted more money, either in reduced costs or increased revenue (R. 189-192). The Big Sandy & Kentucky River Railroad desired any basis of car hire which would eliminate all expense to it in connection with its use of cars which it did not own, and wanted this concession because it needed the money and thought the suggestion was fair (R. 253-256, 276-278).

The California Central Railroad desired its car hire on a demurrage basis so that the industry which owned it and which it served, could compete with similar industries located on the lines of its connection. This would

permit it to use non-owned freight cars without any payment. At the same time, it was not willing to give up the divisions of joint rates which it was receiving (R. 534, 535). The Natchez, Columbia & Mobile Railroad asked for five days' free use of non-owned freight cars which would relieve it of all obligation to pay any car hire. It had become a subscriber in order to get reclaim and per diem on cars owned by it but did not feel that it should allow free time on its own cars. It justified its free use of non-owned cars in line-haul traffic by a reference to switching reclaim; by the fact that its revenues were small, and because it delivered its original traffic to its connections (R. 605-614).

The Ozark Southern Railroad frankly said that it desired to pay nothing for the use of freight cars belonging to other railroads, taking the position that it gathered traffic for the St. Louis-San Francisco, its connection; that its own line was short and that the St. Louis-San Francisco ought to sacrifice something (R. 400-402). The Belfast & Moosehead Lake Railroad desired the free use of non-owned freight cars in order to keep the railroad going, saying that it should be treated as an industry (R. 187, 188). The Marinette, Tomahawk & Western Railroad wished to be treated as an industry so far as car hire was concerned, but was willing to pay car hire if its divisions were sufficiently increased (R. 395-400).

The Pickens Railroad asked for two days' free use of non-owned freight cars and urged the allowances made by the Railroad Administration as a precedent therefor (R. 712-716). The Hampton & Branchville Railroad wanted three days' free use of non-owned cars, because it originated a substantial amount of tonnage and felt that its divisions were not sufficiently high. This road had actually received an increase in its divisions, based partly on the car hire it was paying (R. 739-744). The

Magma Arizona Railroad wished to be treated as a shipper so far as car hire was concerned, and urged its lack of revenue in justification thereof (R. 510-515).

This testimony is representative of all the testimony in which the free use of non-owned freight cars in line haul traffic was requested. The reasons for the requests, assigned in that testimony, together with the conceded fact that some such allowances had been made by subscriber railroads in violation of the Per Diem rules, constitute the entire basis of fact in the record justifying the conclusions reached in the first part of Paragraph (5).

In considering the validity of the requirements of Paragraph (5), there are certain fundamental facts to be borne in mind. The railroads which will be entitled to the free use of freight cars belonging to other railroads are common-carrier railroads just as appellants are common-carrier railroads, and as such are subject to the same obligations and entitled to the same rights. One of their obligations is to own or furnish an adequate supply of cars in which to haul their own traffic. *Chicago, Rock Island & Pacific Railway* v. *Hardwick Elevator Company*, 226 U. S. 426; *Pennsylvania Railroad Co.* v. *Puritan Coal Co.*, 237 U. S. 121; *Illinois Central Railroad Co.* v. *Mulberry Hill Coal Co.*, 238 U. S. 275; *Pennsylvania Railroad Co.* v. *Sonman Coal Co.*, 242 U. S. 120.

This is a fundamental rule of law, and the Commission itself has applied it in many cases. In *Virginia Blue Ridge Railway* v. *Southern Railway Company*, 96 I. C. C. 591, there was a specific request by complainant that it be permitted to use non-owned freight cars at the expense of the Southern Railway. In denying the prayer of the petition, the Commission said at page 593:

> "As a common carrier participating in joint rates, complainant is under an obligation to furnish its

share of the equipment. This it may do either by purchase or rental. The per diem that complainant pays for car hire is merely equivalent to interest, depreciation, insurance, taxes and other car-ownership costs which it would have to bear if it owned the cars used in interline traffic. The car owner incurs these costs in the first instance, and is reimbursed by complainant through the per diem or rental charges, thereby relieving the latter of the necessity of investing in equipment for this service."

This conclusion was adhered to and followed in *Western Pine Lumber Company* v. *Director General*, 96 I. C. C. 625; *Morehead & North Fork Railroad* v. *Chesapeake & Ohio Railroad*, 100 I. C. C. 45; *Jefferson & Northwestern Railroad* v. *Missouri-Kansas-Texas Railroad Co.*, 102 I. C. C. 72; *Chaffee Railroad* v. *Carriers*, 102 I. C. C. 53; and *M. & O. L. Railway* v. *N. Y. C. R. Co.*, 104 I. C. C. 389. And in *Coal from Sewell Valley Railroad Stations*, 58 I. C. C. 261, referred to at page 399 of the Commission's first report (R. 47), the Commission required the Sewell Valley to equip itself with that proportion of coal cars which it was supposed to own.

In the hearings before the Commission, counsel for the American Short Line Railroad Association made the following statement (R. 138):

"That as a general rule the Short Line Association agrees that the short line as a car user should pay the equivalent of interest, depreciation, taxes and other car ownership costs that it would have to pay if it owned its just share of the cars used in interline traffic."

And, as we have pointed out, in Finding 1 in its first report (R. 92), the Commission itself specifically recognized the right of all common-carrier railroads, including appellants, to receive compensation for the use of their cars by other railroads at the rate of $1 per car per day. This is in keeping with its decision in *Morehead &*

North Fork R. Co. v. *C. & O. R. Co.*, 100 I. C. C. 45, where it is said at page 48:

> "It is a fundamental principle that a car owner is entitled to adequate compensation for the use of his car by another carrier."

Notwithstanding the law and these facts, the first part of Paragraph (5) permits the use of freight cars belonging to appellants and other railroads similarly situated, in line-haul traffic, without compensation, or adequate compensation, or requires such railroads to expend their money in paying the car hire expenses of certain of their connections. As in the case of Paragraphs (2) and (3) of the order, it is impossible to definitely determine the reasons because of which the Commission reached this conclusion. Although its first report includes a lengthy discussion of the reasons assigned by individual railroads in support of the requests made by them, none of these reasons justify the requirement of the first part of Paragraph (5).

At page 387 of its first report (R. 35), reference is made to the expenses incurred by the so-called short lines in handling their traffic. As we have pointed out, appellants sustain precisely the same expenses and handle their traffic under the same conditions. They may receive a longer haul on some traffic but on much of it they do not. And in any event, the charges collected by such "short lines" are presumed to compensate them for their expenditures in furnishing equipment. The Commission has so held. *Demurrage on Coal, etc.*, 102 I. C. C. 554, 557.

At the same page of the first report (R. 35), reference is also made to the two days' free use of cars allowed by the Railroad Administration during Federal control. As we have pointed out, this allowance was made by the Director General in return for a waiver of claims

against him so that he received value for what he gave. In this case appellants and other railroads similarly situated will receive nothing. What was done by the Director General is not a good precedent.

In discussing the situation of individual roads, at pages 387 to 390 of its first report (R. 35-38), the Commission indicates that the railroads there referred to were not making enough money to justify a requirement that they pay for non-owned freight cars used by them. This is scarcely a reason for imposing this expense upon the connecting lines of such roads. Car hire is an operating expense as local to each railroad as amounts expended for rail, ties, and wages of employees. If a railroad's total revenue is insufficient to pay all of its expenses, the Act to Regulate Commerce specifies a number of methods by which that revenue may be increased. Rates or divisions may be increased. There is, however, no provision of the Act which permits an increase in the net revenue of a railroad through the requirement that its operating expenses be directly paid by its connections.

At page 391 of its first report (R. 39) the Commission refers to the fact that some subscriber railroads have heretofore allowed the free use of non-owned freight cars in line-haul traffic by certain of their connections, in violation of the Per Diem Rules. This fact, however, does not justify the requirements of Paragraph (5). At most, this circumstance could only create an unlawful discrimination. Such a discrimination was not proven on the record, and the Commission has not found that it existed. The free use of non-owned freight cars is permitted to certain carriers under Paragraph (5) because it is said to be reasonable. And even if the facts justified a finding of discrimination, it is required that appellants be given the right to remove it by discontinuing

their present allowances. *Great Northern Ry. Co.* v. *Minnesota, supra.*

At pages 392 and 394 of its first report (R. 40, 42), the Commission refers to the claim of some railroads that the free use of freight cars on line-haul traffic is analogous to the terminal switching reclaims permitted as between subscribers to the Per Diem Agreement. It is not certain that this alleged analogy moved the Commission to reach the conclusions expressed in Paragraph (5), but in any event the analogy does not exist. We have explained at length that terminal switching reclaim is a voluntary refund made by subscriber roads, in consideration of benefits moving to them, including the reciprocal right to reclaim. For terminal switching reclaim granted under the Per Diem rules, every subscriber road receives value. For the free use of non-owned freight cars granted by Paragraph (5), appellants and other railroads similarly situated will receive nothing.

Moreover, there is a justification for terminal switching reclaim, in that switching charges generally are not high enough to permit the payment of per diem without reclaim and they cannot practically be increased so as to permit such payment. On the other hand, line-haul traffic is handled either under local rates or divisions of joint rates, either of which may be increased, with the permission of the Commission, in the manner specified in the Interstate Commerce Act. There are no practical objections to doing this and it appears from the record that some roads had done it. The York Utilities Company, for example, increased its demurrage charges to cover per diem paid by it. Particularly, may divisions of joint rates be readjusted if the revenue of a railroad is insufficient. This court has already approved such readjustments in some cases. *New England Divisions*

Case, 261 U. S. 184; *Beaumont, Sour Lake & Western Railroad, et al*, v. *United States*, 282 U. S. 74.

The Commission itself has repeatedly recognized the essential difference between the free use of non-owned freight cars in line-haul traffic under local or joint rates, and switching reclaim. *Virginia Blue Ridge Railway* v. *Southern R. Co.*, 96 I. C. C. 591; *Western Pine Lumber Company* v. *Director General*, 96 I. C. C. 625; *Jefferson & Northwestern R. Co.* v. *M-K-T Ry.*, 102 I. C. C. 72; *Marcellus & Otisco Lake R. R.* v. *New York Central R. Co.*, 104 I. C. C. 389.

At page 394 of its first report (R. 42) the Commission refers to the claim that short railroads should be treated as shippers or consignees and point is made of the demurrage allowances to shippers and consignees of free time in which to load or unload shipments. Such a comparison overlooks the legal situation of a railroad and a shipper. Free time for loading or unloading is given a shipper or consignee because that is part of a common-carrier railroad's obligation to the public. The railroad receives its compensation therefore in the rates paid for freight transportation. Appellants and other railroads similarly situated have no such duty to other common-carrier railroads, and if they are required to allow such free time will receive no compensation for it. Moreover, it is to be assumed that the carriers benefitted under Paragraph (5) now receive compensation in their rates charged against the public, for any expenditures made by them in furnishing freight cars. The Commission so held in a case involving the precise issue. *Demurrage on Coal, etc.*, 102 I. C. C. 554, 557. Permitting them to use non-owned freight cars without payment is equivalent to increasing their rates at the expense of appellants and other railroads similarly situated.

On page 395 of its first report (R. 43), the Commission indicates that the free use of non-owned freight cars is allowed as a method of increasing the net revenues of some railroads which are financially unable to litigate a divisions case, and that the free use of such cars is a simpler and less expensive method of transferring revenue to short lines than establishing joint rates with divisions thereof. Such reasoning does not justify the requirements of Paragraph (5). As we have pointed out, the rates, revenues, expenses and financial condition of railroads were not issues in the proceedings before the Commission, and there was no evidence in the record sufficient to support a decision on these grounds. There were some statements by individual railroads that they were not making enough money to pay car hire, but on the other hand it affirmatively appeared that many others had sufficient revenue. The matter not being in issue no evidence of this sort was offered on behalf of appellants or other members of the American Railway Association.

There is no section of the Interstate Commerce Act which gives the Commission authority to adjust the distribution of revenue between railroads by an adjustment of car hire. Paragraph (6) of Section 15 (U. S. C. A., Title 49, p. 426) gives the Commission broad authority over the divisions of rates between carriers, but this investigation by the Commission was not instituted under that section of the law. And even if it had been, the record is not sufficient to sustain a transfer of revenue from appellants to other carriers, as it does not contain that evidence which the statute requires. *Brimstone Railroad Co.* v. *United States*, 276 U. S. 104.

The reasons urged as justifying the free use by some railroads of non-owned freight cars for coal loading were identical with those to which we have referred, except that two additional ones were advanced. One was that

Paragraph (12) of Section 1 of the Interstate Commerce Act required it (R. 814). That the Commission had this construction of the law in mind is obvious from the wording used in the latter part of Paragraph (5) of the order. It provides:

> "That no car hire need be paid on cars received for return loading with coal from coal mines which are customarily dependent upon connecting carriers for car supply."

This language is borrowed from Paragraph (12) of Section 1 of the Act, which requires every carrier by railroad to make a proper distribution of cars for the transportation of coal,—

> "among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply."

This section of the Act, however, does not relate in any way to the matter of car hire as between railroads. It relates only to car distribution, a matter not here in issue. It was considered by this court in the *Assigned Car Cases*, 274 U. S. 564. As appears at pages 576 and 577 of this court's opinion in that case, three constructions of Paragraph (12) of Section 1 of the Act were urged upon this court. The Commission itself contended that the paragraph described a rule of car distribution, and its contention was upheld. Moreover, that case involved no question of payment for non-owned cars used. The only claim of confiscation was made by the private car owners, but the confiscation was claimed to result from the manner in which their cars were distributed among mines. At page 574 of this court's opinion it was said,—

> "Nor is any question presented here concerning the compensation of or allowance to private car owners for the use of their cars in performing the transportation under the tariffs."

A reading of the statute is demonstrative of the fact that it does not require any railroad to furnish its cars to a mine customarily dependent upon it for car supply but located on a connecting railroad, without charge against that connecting railroad for the use of the car. It is true that in *Ohio Farm Bureau* v. *Carriers,* 89 I. C. C. 489, and *Kanawha Black Band Coal Co.* v. *C. & O. Ry.,* 141 I. C. C. 433, the Commission relieved the Federal Valley Railroad and the Kanawha Central Railway from the obligation to pay per diem on coal cars, but in neither case was it held that Section 1 (12) of the Act authorized or required that decision.

In *Tioga Coal Company* v. *B. & O. R. R.,* 101 I. C. C. 611, referred to by the Commission at page 389 of its report (R. 37) the Commission did not consider the matter of car hire at all. That case involved nothing but car distribution, and the Commission held that since the railroad serving the mine had no cars, the Baltimore & Ohio was required to furnish cars for it under Paragraph (12) of Section 1 of the Act. The statement of the Commission that the matter of car hire was considered in this case is in error.

The second additional reason urged as justifying the free use by some railroads of non-owned cars for coal loading was that no demurrage is collected from shippers on empty coal cars placed at mines or held on mine sidings for billing (R. 904, 905). Thus, a coal originating railroad using non-owned cars for coal loading is obliged, under the Per Diem rules, to pay $1 per car for each day it has such cars, but is unable to recover any of this per diem through demurrage collections from shippers, so long as the cars are held at mines or on mine sidings.

Cars for coal loading are handled under Car Distribution Rules (R. 904). These rules apply to all carriers,

including appellants, and to the extent that they impose a burden upon railroads, they impose it upon appellants and other railroads similarly situated, to the same extent and in the same degree as upon those railroads which are given the free use of non-owned coal equipment under the latter part of Paragraph (5). The Commission itself has declined to permit any change in this situation.

In *Demurrage on Coal, etc.*, 102 I. C. C. 554, the Tennessee Railroad had filed a tariff making a demurrage charge against coal equipment held at mines, the charge being proposed as an offset to per diem paid on that equipment by the railroad. It was urged in justification of the charge that without it, the railroad paid as much or more in per diem on such cars as it received in freight charges. Referring to the proposed charge the Commission said at page 557:

> "It would have the effect of largely offsetting respondents' cost of car hire by assessing shippers an amount equal thereto beyond a certain time. Respondent is under obligation to furnish the equipment necessary for the transportation of traffic tendered to it, and if it does not possess such equipment the charges paid for the revenue thereof cannot be considered as an item of expense which is not included in the rate."

It then approved the application of the Car Distribution Rules and required the proposed tariff to be cancelled, saying at page 558:

> "The exception here proposed has no apparent purpose except to transfer respondent's car-hire expense to the coal operators."

Under the latter part of Paragraph (5), the same Tennessee Railroad has been permitted to transfer its car-hire costs to the Southern Railway, which has not been treated with the same consideration as the coal operators were treated.

A consideration of the evidence in the record of the proceedings before the Commission, demonstrates that it is insufficient to support the requirements of Paragraph (5) of the order. The evidence to which we have referred is typical and representative of all such evidence. We have referred to all reasons and arguments advanced by the witnesses as justifying the free use by some railroads of freight cars not owned by them. None of those reasons or arguments support or justify the Commission's conclusions as expressed in Paragraph (5).

The requirements of that paragraph violate fundamental rules of law. The paragraph relieves certain common-carrier railroads of their primary obligation to furnish their share of that equipment necessary in the transportation of freight. It confers upon those railroads rights which their counsel did not claim. It directly contradicts the principle announced in Finding 1 in the Commission's first report and denies to appellants the right recognized and asserted in that Finding. It goes far beyond the authority conferred upon the Commission by Section 1 (14) of the Act, which contemplates the payment of some compensation by every railroad which uses the freight cars of another railroad.

It has the direct and unavoidable effect of either taking appellants' cars without compensation or upon payment of a compensation less than that found reasonable by the Commission, or of requiring appellants to pay the car hire bills of other railroads, incurred in the operation of those railroads. And for these losses and expenditures, appellants will receive nothing, in money, service or otherwise. Neither the reports or order of the Commission suggest that any advantage will result to appellants to compensate them for the losses imposed upon them by Paragraph (5). The requirements of that paragraph plainly violate the rules of law laid down by

this court in *Reagan* v. *Farmers L. & T. Co., supra,* in which this court said at page 399:

"the machinery of government with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking of any private property legally acquired and legally held."

The precise requirement of Paragraph (5) of the order was passed upon by this court in *Louisville & Nashville Railroad* v. *Stock Yards,* 212 U. S. 132. This case involved the validity of a provision of the Constitution of the State of Kentucky, which, as construed by the Kentucky courts, required the Louisville & Nashville Railroad to interchange its cars with other carriers, but made no provision for compensation to be paid by such other carriers to the Louisville & Nashville for the use made by them of those cars. In sustaining the attack made on this requirement of the statute, this court said at pages 143 and 144:

"It was argued, however, that the requirement that the plaintiff in error should deliver its own cars to another road was void under the Fourteenth Amendment as an unlawful taking of its property. In view of the well known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an unreasonable refusal, by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The constitution of Kentucky is simply a universal undiscriminating requirement, with no adequate provisions such as we have described. The want cannot be cured by inserting them in judgments

under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such. (Citing cases.) It follows that the requirement of the state constitution cannot stand alone under the Fourteenth Amendment, and that the judgment in this respect also, being based upon it, must fall."

The Commission has gone much further than the State of Kentucky did. It has not only failed to provide compensation to appellants for the use of their freight cars by other railroads, but has specifically prohibited the recovery of such compensation. Such a prohibition clearly violates the law with respect to confiscation of property, as announced in the cases we have cited.

Appellants only ask that there be secured to them the right to receive compensation when their cars are used by other railroads, that compensation to be at the rate of $1 per car per day, the amount found proper by the Commission. With this compensation secured to them, appellants concede their obligation to permit the use of their cars by other railroads. Since they are legally entitled to such compensation, and since Paragraph (5) of the order denies it to them without justification in law or in fact, we submit that that paragraph of the order should be set aside as arbitrary and unreasonable and as taking the property of appellants without due process of law and without compensation, in violation of their constitutional rights.

(d) The evidence to which we have referred is representative of all evidence upon which Paragraphs (2), (3) and (5) of the Commission's order must have been predicated. Unless the Commission considered facts not in the record, which would certainly require that its order be set aside, *United States* v. *Abilene & Southern R. Co.*, 276 U. S. 104, the justification in fact for what it has done must be found in such evidence. As we have pointed

out, it is impossible to definitely determine from anything contained in the Commission's reports and order, just what moved it to reach the conclusions expressed in Paragraphs (2), (3) and (5) of its order.

While it did include nine findings in its first report (R. 92, 93), these findings are no more than a statement of conclusions reached. The Commission seems to have fallen into the error referred to by this court in *Beaumont, Sour Lake & Western Railway Company* v. *United States,* 282 U. S. 74, 86, and *Florida* v. *United States,* 282 U. S. 194, 215. There is a complete lack of those basic or essential findings which are required to support its order. Its reports are nothing but a recital of the various contentions and arguments advanced by different witnesses, no findings of fact being reached as a result of the discussion of those contentions.

It may be said however, from a consideration of all the statements contained in the Commission's reports, that it was much moved by the alleged financial inability of short railroads to pay for their use of non-owned freight cars, and the many statements that the trunk lines, such as appellants, should be required to afford them some financial relief. This thought is continuously present throughout the entire discussion of evidence in the Commission's first report, the general atmosphere of the report being that the trunk lines had arbitrarily imposed hardships upon shorter railroads and treated them improperly. Accompanying this thought there is a constant suggestion that the financial burden said to rest upon such short railroads, should be cast upon the connecting carriers of those railroads.

As illustrative of this atmosphere, we refer to the language on page 377 of the Commission's first report (R. 25) in which the alleged disadvantages of associate members of the American Railway Association are dwelt

upon; to the language on page 387 of the Commission's first report (R. 35) in which reference is made to the disabilities of the so-called "short lines" as compared with their trunk line connections; to the discussion of individual railroads at pages 388 to 390 of the Commission's first report (R. 36-38) in which the car-hire charges of those railroads and their claimed inability to pay them are stressed; to that language on page 392 of the Commission's first report (R. 40) in which reference is made to the "losses" imposed upon short railroads by the refusal of the trunk lines to allow such railroads the free use of non-owned freight cars; to the language on page 394 of the Commission's first report (R. 42) in which it is indicated that trunk lines have an obligation to give shippers, consignees and short railroads the same treatment, and that they will lose no money by so doing; to the language on page 395 of the Commission's first report (R. 43), in which it is indicated that allowing short railroads the free use of non-owned freight cars is a better method of transferring revenue to them than establishing joint rates and divisions thereof; to the language on pages 399 and 400 of the Commission's first report (R. 47-48) in which reference is made to the accounting burdens said to be imposed upon short railroads under the Per Diem rules; and to the language at the top of page 399 of the Commission's first report (R. 47) in which the Per Diem rules of the American Railway Association are made to appear as arbitrary and improper enactments.

All these circumstances justify the conclusion that what the Commission was trying to do in this case was effect a redistribution of revenue as between common-carrier railroads. Certainly, this is what the Commission has done. It apparently concluded that certain carriers needed financial relief; that other carriers should

be required to furnish such relief, and that this financial relief could be appropriately extended to the carriers in need of it through a readjustment of car-hire expense. If this was the theory upon which the Commission acted in disposing of the case, as it appears to be, Paragraphs (2), (3) and (5) of the order must be set aside for a number of reasons.

Per diem paid by a carrier does not have the same legal status as rates and divisions received by it. The Commission has so held. In *Marcellus & Otisco Lake Railway* v. *New York Central R. Co.*, 104 I. C. C. 389, the contention made by complainant was that Paragraphs (a) and (b) of Section 208 of the Transportation Act, 1920, which prohibit any change in rates and divisions effective at the termination of Federal control, without permission or agreement, also prohibit any change in per diem charges without the same permission or agreement. This contention the Commision overruled, saying at page 391 of its report:

> "But the present controversy is one between carriers with respect to per diem charges, whereas the rates, fares, or charges contemplated by the statute plainly have reference to rates, fares or charges collected from the public, and section (b) simply has reference to the divisions of such charges between participating carriers."

As we have pointed out, the rates, divisions, financial condition and operating expenses of the railroads were not an issue in the proceedings before the Commission. They were not made issues by the order instituting the investigation and it was repeatedly ruled upon the hearings that they had no place in the case. For this reason appellants introduced no evidence to show the volume of their divisions and rates, the service performed thereunder, their financial condition, their operating conditions or expenses or any other fact which would have

been important in a divisions or revenue case. Had they known or been advised that their financial condition was of importance, they could undoubtedly have shown that relatively, they were in no better financial condition than short railroads, and were no better able to sustain the expenditure required to furnish freight cars in which to move their traffic. But even though appellants and other railroads similarly situated receive sufficient revenue from various sources to pay the car hire expenses of some railroads, this fact would not justify a requirement that they make the payments. In *C. M. & St. P. R. Co.* v. *Commission,* 274 U. S. 344, this court said at pages 350 and 351:

> "The state has no power to require petitioners to haul the logs at a loss or without compensation that is reasonable and just, even if they receive adequate revenues from the intrastate log haul and interstate lumber haul taken together."

To the same effect are the decisions of this court in *Brooks-Scanlon Co.* v. *Commission,* 251 U. S. 396, 399; and *C. M. & St. P. Ry.* v. *Wisconsin,* 238 U. S. 491, 500.

The witnesses for some short railroads did state their conclusion that their companies did not have sufficient revenue with which to pay car hire, but this evidence was scattering and was not given with respect to all such railroads.

In this state of the record, the effort of the Commission to effect a redistribution of revenue between railroads under the guise of a regulation of car hire, cannot be sustained. It attempted to do substantially the same thing in *Baltimore & Ohio Railroad* v. *United States,* 277 U. S. 291. In that case the question was whether or not the east-side or west-side carriers at St. Louis-East St. Louis should pay the charges for the transfer of freight across the Mississippi River at those points. Those

charges had always been paid by the west-side lines, but the Commission, under the guise of prescribing a reasonable practice, required that on certain traffic they be paid by the east-side lines. At page 298 this court said:

> "The matters in controversy in both proceedings were purely financial. There was no question concerning furnishing of facilities or the handling of traffic."

This is also true in the case at bar, as there was no issue before the Commission with respect to the furnishing or distribution of cars, the transportation of freight in those cars, or the rates to be charged for such transportation. The only change made by the order is a financial one. In the case cited, this court said at page 299, after stating that the tariffs of the east-side lines applied only to and from East St. Louis, and that all their revenue was retained by them:

> "But the Commission's order requires the rates, so by tariff provisions limited to East St. Louis, to be extended to St. Louis. This operates to deduct the cost of transfer from their revenue. In effect it is to require the cancellation of such tariff provisions, and to authorize a corresponding change in the tariffs of the appellee lines. It results that the controversy before the Commission involved divisions or apportionments of revenues derived from through traffic."

The same effect is produced by the Commission's order in the case at bar. Appellants and other railroads similarly situated had in effect rules under which they preserved their revenue by declining to allow other railroads to use their cars without the payment of compensation in some form. The Commission's order requires such changes in those rules as will require a deduction from the income of appellants and other railroads similarly situated, with a corresponding increase in the net

revenue of the railroads benefitted thereby. At page 300 of its opinion in the case cited, this court said:

> "Paragraph (6) of Sec. 15 empowers the Commission to prescribe divisions of joint rates, but there must be evidence adequate to justify action, *Brimstone Railroad & Canal Co.*, v. *United States*, 276 U. S. 104. *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274. *New England Divisions Case*, 261 U. S. 184. That rule may not be avoided by a broad construction of the word 'practice.' The record here contains all the evidence that was submitted to the Commission. Its report shows that 'the propriety of divisions was not the subject of inquiry and investigation.'"

The same situation obtained in the case at bar. The record in this case contains all the evidence submitted to the Commission. It is clear that the rates, divisions and financial condition of the railroads was not the subject of inquiry. Nevertheless, under the guise of regulating car hire between railroads, the Commission has sought to avoid the rule governing the fixing of divisions, and has entered an order, the only effect of which is to require a transfer of revenue from appellants and other railroads similarly situated to those railroads benefitted by Paragraphs (2), (3) and (5) of its order.

At page 300 of its decision in the case cited, this court said, referring to the rates of the west-side lines:

> "There is a strong presumption that the general level of their rates has been adjusted to include reasonable compensation for the services covered by them."

So, in the case at bar, there is the same presumption that the rates of the railroads benefitted under Paragraphs (2), (3) and (5) of the order have already been adjusted so as to compensate them for any amounts expended by them in the payment of car hire. The Commission has specifically so held in one case. *Demurrage*

on Coal etc., 102 I. C. C. 554. Finally, at pages 301 and 302 of its opinion in the case cited, this court said:

> "The merits of the changes made by the order cannot be determined without a consideration of facts substantially similar to those specified in paragraph (6) of Sec. 15 relating to the division of joint rates. The case was not presented by complainants or considered by the Commission on that basis. There was no evidence to show the amount of revenue required to pay operating expenses, taxes and a fair return on the property of appellee lines or that their rates were not adjusted or were not sufficient to cover the transfer charges in question. There was nothing to support a finding that it is or will be unjust or unreasonable for the appellee lines to bear the cost of transfer of the westbound through traffic. The order cannot be sustained. *Florida East Coast Ry.* v. *United States*, 234 U. S. 167. *Louis. & Nash. R. R.* v. *United States*, 238 U. S. 1."

This language also applies to the case at bar. The record made in it does not contain evidence with respect to the facts specified in Paragraph (6) of Section 15 of the Act. The case was not presented to or considered by the Commission as a revenue or divisions case. The only effect of the order entered is to transfer revenue from appellants and other railroads similarly situated to certain of their connecting lines. There is no evidence in the record which supports the Commission's findings that it is unreasonable for every railroad to pay its own car-hire and car-accounting expenses. Indeed, there could not be, for the obligation of every common carrier to pay its own operating expenses is a necessary incident of its operation, and no evidence could justify a requirement that such expenses of a railroad must be paid by another railroad.

We submit that since the record does not support the requirements of Paragraphs (2), (3) and (5) of the order, those paragraphs should be set aside.

IV.

THE CLASSIFICATIONS OF RAILROADS MADE BY THE COMMISSION'S ORDER ARE ARBITRARY AND UNREASONABLE AND ARE NOT SUPPORTED BY ANY EVIDENCE IN THE RECORD OF THE PROCEEDINGS BEFORE THE COMMISSION.

As we have heretofore pointed out, each paragraph of the Commission's order creates a classification of railroads, and the classification created by each paragraph is different from that created by every other paragraph. We are aware of those decisions of this court in which classifications of certain sorts have been approved, but submit that these cases do not justify what the Commission has done in the case at bar. We may refer to a few of them to illustrate our argument.

One line of cases upholds the right of states to fix passenger rates varying with the length of the line. Thus, in *Dow* v. *Beidelman*, 125 U. S. 680, this court sustained a statute of the State of Arkansas fixing rates for passenger transportation varying from 3 cents a mile to 8 cents a mile on railroads ranging from 15 miles or less in length to 75 miles or more in length. This classification of railroads was sustained because, as stated by this court at page 691 of its opinion:

> "The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws."

A similar statute was sustained in *Chesapeake & Ohio Railway* v. *Conley*, 230 U. S. 513. The statute there involved had been enacted by the State of West Virginia and prescribed certain passenger fares to be applied by the railroads doing business in that state, with the proviso that the Act should not apply to a railroad less than fifty miles in length and not a part of any other railroad over fifty miles in length. This court sustained the validity of the statute on the ground that the classification of railroads made by it was not unreasonable or arbitrary, citing *Dow* v. *Beidelman, supra.* In these cases the controlling circumstance seems to have been the undoubted right of a state to exercise a control over railroads operating within its borders. Such holdings are consistent with other decisions of this court to which we have referred and which have uniformly sustained the exercise by a state or municpality of the police power resident in it, provided its action is not clearly arbitrary or unreasonable.

Another line of cases is that relating to the validity of statutory requirements calculated to produce safety to passengers upon railroads. *New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628 is such a case. The statute of New York, the validity of which was there sustained, prohibited the use of certain methods of heating passenger cars, with the proviso that the Act should not apply to railroads less than 50 miles in length. This court held (pp. 631, 633) that the object of the statute was to protect persons traveling on passenger cars in the State of New York against the perils resulting from heating passenger cars in a particular manner, and in dealing with the classification of the statute said at page 634:

> "In any event, there is no such discrimination against companies having more than fifty miles of

road as to justfy the contention that there has been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing business in the State of the class to which it is made applicable."

In *C. R. I. & P. Ry.* v. *Arkansas*, 219 U. S. 453, there was involved a law of Arkansas which prohibited every railroad from operating freight trains on its lines in the state with a crew consisting of less than six designated employes, with the proviso that the Act should not apply to railroads less than fifty miles in length or to any railroad, in case the freight train consisted of less than twenty-five cars. This court sustained the validity of the statute after a reference to a number of similar cases, including *New York, New Haven & Hartford R. Co.* v. *New York, supra.* It was held that the State of Arkansas was obliged to establish regulations necessary for the safety of its citizens, and that statutes directed to such an end have their source in the power of a state of caring for the public safety of those within its jurisdiction. It was further said that such enactments must be sustained unless inconsistent with some Federal right or unless purely arbitrary in their nature.

In *St. L. & I. M. & S. R. Co.* v. *Arkansas*, 240 U. S. 518, a statute of Arkansas which required railroads to use six delegated employes in their switching operations, but did not apply to railroads less than 100 miles in length, was sustained principally on the authority of *C. R. I. & P. Ry.* v. *Arkansas, supra.* In this case also the enactment was sustained as a measure of public safety. In *Wilson* v. *New*, 243 U. S. 332, the exemption of certain short line and electric railroads from the operation of the so-called Adamson law was held not to invalidate that enactment principally on the authority of the cases to which we have referred. In the case at bar

there is no question of public safety nor of any other direct public interest. Nor is there any question of the power of a state to regulate its purely domestic concerns.

In the cases to which we have referred, this court, while sustaining the statutes there involved, held that even those regulations calculated to secure public safety or enacted in the exercise by a state or other local authority of a jurisdiction resident in it, must be reasonable and not arbitrary and that they must operate with some degree of uniformity.

Thus, in *Dow* v. *Beidelman, supra,* this court said at page 691:

> "If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws."

And in *N. Y. N. H. & H. R. Co.* v. *New York, supra,* this court said at page 634:

> "The statute is uniform in its operation upon all railroad companies doing business in the State of the class to which it is made applicable."

And in *C. R. I. & P. Ry.* v. *Arkansas, supra,* this court said at page 466:

> "And the statute being applicable alike to all belonging to the same class, there is no basis for the contention that there has been a denial of the equal protection of the laws."

We submit that the cases cited and others to the same effect, are not authorities which justify the classifications created under the Commission's order in this case. The classes of railroads created by the various paragraphs of the order have no relation to each other. No uniform method has been followed in determining each class and there appears to be no consistent reason for including any railroad in any particular class.

Above all things, the order leaves certain railroads, including appellants, to sustain the duties and obligations imposed upon them by law when they became common-carrier railroads, but undertakes to relieve other railroads of certain of those obligations by imposing them upon appellants and other railroads similarly situated. Such a classification of railroads, one class consisting of railroads which must sustain more than their legal obligations and another class consisting of railroads which are relieved of certain of these obligations, is surely beyond the Commission's power.

The railroads which, under Paragraphs (1) and (5) receive per diem but are not obliged to pay it, are in the same situation as to mileage, and other circumstances, as many railroads which receive per diem and also are obliged to pay it. Thus, the Gainesville Midland Railroad, a subscriber road 74 miles long and owning four freight cars (p. 1, Ex. 40; R. 1168a), receives per diem on its cars and the free use of non-owned cars, but the Columbia, Newberry & Laurens Railroad, a subscriber road 75 miles long and owning 56 cars (p. 2, Ex. 40; R. 1168b), receives per diem and also pays it. The distinction between such roads depends upon their ability to return non-owned freight cars to the subscriber connection from which they were received.

The classification created by Paragraph (2) depends entirely upon subscription to the Per Diem Agreement of the American Railway Association, a private agreement between railroads, the length of line and method of handling cars being of no consequence. Under Paragraph (3) the classification again depends upon length of line and methods of handling cars. The classification created by Paragraphs (4) and (5) again depend upon length of line and a somewhat different method of handling cars.

In all the decisions of this court to which we have referred, the enactments there under consideration showed a connection between cause and result. Thus, as suggested by this court in *N. Y. N. H. & H. R. Co.* v. *New York*, *supra*, the exception of roads less than 50 miles in length from the operation of the statute involved was due to the lesser danger incurred in traveling on such lines.

But what connection is there between the length of a railroad or its ability to return freight cars to the railroad from which they were received and the right to impose its car-hire and car-accounting expenses upon its connecting lines? Obviously there is none. No where does it appear in the reports and order of the Commission that the distinctions between railroads under the order are due to any legitimate cause or result from any particular mode of reasoning. So far as appears from the record and from the reports of the Commission, the classifications decided upon are purely arbitrary.

Moreover, in every case decided by this court, the railroads included in any class have been capable of exact ascertainment. This is not true under the order herein attacked. The membership of some classes is dependent upon the ability of railroads to return all freight cars to the connection or to the subscriber connection from which they were received, and the status of such railroads will, therefore, vary from time to time. Nor is there any uniform distinction between railroads because of their length. Many railroads less than 100 miles in length will be required to be treated in the same fashion as railroads of greater length, while other railroads less than 100 miles in length will receive concessions.

Nor can the classifications created by the Commission be justified as uniformly benefitting railroads in poor financial condition, since the order will not so operate.

Many railroads which need no financial assistance will receive it under the order; while others not so well off will not receive it. Even the rights given to a certain class under the Commission's order are not uniform. Under Paragraph (5) a designated class of railroads is given the free use of non-owned freight cars. Part of them, however, will receive only two days' free use of such cars for each loaded car interchanged, while the others will pay nothing for their use of such cars. In this instance, the distinction between railroads is based upon the use to which non-owned freight cars are to be put.

In view of the lack of any uniformity, definiteness and reason in the making of the classifications which result from the order, it may only be concluded that those classifications are arbitrary and unreasonable and have no relation to whatever objects were sought to be accomplished.

The situation presented is somewhat similar to that presented in *Adair* v. *United States*, 208 U. S. 161. In that case, an attack was made upon an Act of Congress prohibiting any common carrier from requiring any employee, as a condition of employment, not to become or remain a member of a labor organization, and prohibiting any unjust discrimination against an employee because of his membership in such an organization. At page 169 the court observed that while the Act prohibited discrimination against a member of a labor organization, it did not prohibit such discrimination against the non-member. After a considerable discussion of the constitutional rights of railroads under the Fifth Amendment and the right of Congress to regulate interstate commerce, the court said at page 178:

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the

> competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated. But what possible, legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?"

There is certainly no more relation between the results of the classifications created by the Commission's order and the carrying on of interstate commerce than there is between a railroad employe's membership in a labor organization and the carrying on of that commerce. The order of the Commission here attacked does not affect the carrying on of interstate commerce in any way. It only relates to the private relations between railroads with respect to the accounting and payment for non-owned freight cars used. On pages 179 and 180 of the decision in the case cited, this court said, referring to the right of Congress to enact the law:

> "If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business *only* members of labor organizations, or *only* those who are *not* members of labor organizations—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which we have referred can be regarded as, in any just sense, a regulation of interstate commerce. We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons* v. *Ogden*, 9 Wheat, 1, 196; Lottery Case, 188 U. S. 321, 353."

This language also has application in the case at bar. If the Commission has power to classify railroads in such fashion that certain railroads at one time or an-

other will be relieved of certain of their operating expenses and those expenses imposed upon certain other railroads, why may it not require that all expenses of certain railroads be paid by others? Such a requirement would certainly not be sustained and yet it logically follows.

The Commission may have the power to classify railroads for legitimate purposes. We submit, however, that such classifications, if created, must not be in violation of the law; must bear some logical relation to the result sought to be accomplished; must have some degree of uniformity in their application; must not create or cause to be created a discrimination between railroads; must not be arbitrary or unreasonable, and must be supported by substantial evidence. The classifications created by the order here involved meet none of these requirements.

They result in a violation of fundamental law, in that they confiscate the property of appellants and other railroads similarly situated, without justification or reason therefor. From the character of the classifications, it is evident that they bear no logical relation to any legitimate object. Their only purpose seems to be to effect a transfer of revenue as between railroads, a manifestly improper purpose in this proceeding. They create inequalities and discrimination as between railroads, since they confer rights upon some railroads while denying those rights to other railroads under similar circumstances. They are arbitrary and unreasonable, since without reason they classify carriers according to standards which vary in the case of each class and which are not fixed or capable of definite ascertainment. They are not supported by the evidence, since the only justification for them lies in the requests of individual witnesses that the railroads represented by them be given the benefits which the order now confers upon them.

Conclusion.

As we have said, the order of the Commission does not undertake to establish a complete set of rules to govern car-hire settlements between all common carrier railroads. While the Per Diem Code of the American Railway Association contains twenty rules, to say nothing of the Reclaim Rules and the Car Service Rules, the order of the Commission only affects a few of these rules. Per Diem Rule (1) is condemned in so far as it requires the payment of per diem by subscriber railroads less than 100 miles in length and which return all non-owned freight cars used by them to the subscriber connection from which they were received.

Per Diem Rules (5) and (6) are condemned in so far as they prohibit reclaim to nonsubscriber railroads. Per Diem Rule (6) is also condemned in so far as it prohibits the free use of non-owned freight cars in line-haul service by nonsubscribers. Per diem Rules 9, 10 and 11 are condemned in so far as they require subscriber railroads less than 100 miles in length to report all non-owned freight cars used by them directly to the owners of such cars. The resolution of the American Railway Association passed on November 16, 1915, and attached to Per Diem Rule (18), is condemned in so far as it recommends the payment by subscriber roads of mileage instead of per diem for their use of freight cars belonging to nonsubscriber roads.

In all other respects, the Commission's order presumably leaves the Per Diem Code of the American Railway Association in effect as between all subscribers thereto. So far as nonsubscribers are concerned, they are only required to comply with that Code if they are more than 100 miles in length or fail to return all non-

owned freight cars used by them to the subscriber connection from which they were received, in which event they are required to make reports and pay per diem in accordance with the provisions of the Code.

The Per Diem Code of the American Railway Association, in so far as it requires all railroads to report for non-owned freight cars used by them and pay per diem for such cars, does nothing more than require all common-carrier railroads to live up to the obligations imposed upon them by law. It goes no further than this. Every common-carrier railroad is required to furnish equipment in which to transport its own traffic, either by purchasing it or by renting. If such equipment is rented, the lawful obligation of the renting carrier is to make proper reports and payments direct to the railroad owning such equipment.

In Paragraphs (2), (3) and (5) of its order the Commission has condemned rules with respect to car hire which are only a statement of every railroad's legal duty, and in substitution therefor has prescribed rules which relieve certain railroads of obligations inherent in their status as common carriers. In addition, those paragraphs violate the constitutional rights of appellants and other railroads similarly situated.

This has not been done to cure any definitely found violation of law, nor to produce an equality with respect to car hire between all railroads in the country, nor because of any compelling testimony in the record. Paragraphs (2), (3) and (5) of the order are not justified by any of these considerations. It has presumably been done only because the Commission thought that it should be done. The record contains no evidence which may be said to support the action taken. Instead of producing equality and equal treatment as between railroads, the order creates inequalities and requires unjustified differences in treatment. It serves no public inter

whatsoever. The only logical conclusion that may be reached is that the order was entered in an effort to transfer revenue from certain railroads to other railroads, in disregard of the issues made by the order instituting the investigation and the evidence.

The claims of appellants now urged to this court were urged to the Commission and it was fully advised of our position with respect thereto. On the first hearing before the Commission, counsel for the American Railway Association made the statement that the owner of a freight car was entitled to receive proper compensation for its use by another railroad, and that that right could not be taken away from it or abrogated; that the right of the owner to receive that compensation would not be affected by the fact that the using line might not be receiving sufficient compensation for the service it performs (R. 162, 163). In the petition for rehearing filed with the Commission (Part of Ex. 1 certified to this court) the invalidity of the order on the ground that it violated the constitutional rights of the trunk line members of the American Railway Association, including appellants, was specifically urged.

We submit that in this case no distinction can be made between railroads because of their subscription or non-subscription to the Per Diem Agreement of the American Railway Association or because of their length of line, ownership of cars or financial condition. Their substantive legal rights are not affected by these considerations. And although we have discussed the evidence at some length and the possible reasons which may have moved the Commission to make the order attacked, we submit that no evidence and no reasoning could justify that order. It is not a legitimate exercise of the Commission's power to regulate. It produces an arbitrary confiscation of appellants' property, in violation of their fundamental constitutional rights. It dis-

regards all rights of ownership in private property. It departs from well-established and accepted rules of law, which are superior even to the jurisdiction of the Commission. As was said in the *Knoxville Water Company Case*, 212 U. S. 1, at page 18:

> "Our social system rests largely upon the sanctity of private property, and that state or community which seeks to invade it, will soon discover the error in the disaster which follows."

We submit that Paragraphs 2, 3 and 5 of the Commission's order will operate to confiscate appellants' property without due process of law and without compensation, in violation of their constitutional rights; that there is no evidence of record justifying those paragraphs of the order; that they create classifications of railroads which are arbitrary, inconsistent and illogical, and that in making said paragraphs of the order the Commission exceeded its statutory authority. Those paragraphs of the order should be permanently enjoined annulled, suspended and set aside.

Respectfully submitted,

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